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Oppress the Employee: Louisiana's Approach to Noncompetition Agreements

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Oppress the Employee: Louisiana's Approach to Noncompetition Agreements*

I. INTRODUCTION

Imagine a recent college graduate, Bob, with a degree in Computer Science.[1] This student seeks a job as a salesman with any company that will have him. The student is worried that he will never be hired because, even though he received decent grades, he has no prior work experience. After enduring many grueling interviews, Bob receives an offer to work as a Level One Salesperson for ComputerSoftwareCompany.Com. The hiring partner informs him of his salary, his benefits, and what is generally expected of him. The partner tells him that the company will provide all of the training concerning how to sell the products. ComputerSoftwareCompany.Com has a number of major clients for whom they develop new software to meet their changing needs, and part of Bob's job includes contacting these customers regularly and informing them about new products. Bob is so excited about the job he has been offered that he immediately accepts.

The partner then presents Bob with a standard employment contract. The contract states that Bob is being hired as an employee-at-will. The contract includes a noncompetition agreement that prohibits Bob, upon termination of his employment with ComputerSoftwareCompany.Com, from working for any competitor of ComputerSoftwareCompany.Com in any capacity whatsoever for a period of two years from the termination of employment in all of the listed parishes. The agreement lists every single parish of Louisiana, even though ComputerSoftwareCompany.Com only has clients in East Baton Rouge, Ascension, Saint Charles, Saint James, and Orleans parishes. Bob signs the employment contract thinking that noncompetition agreements are never enforced against entry level employees.

Bob begins work at ComputerSoftwareCompany.Com. His first day goes well: he meets his co-employees, fills out more paperwork, sets up his cubicle, and learns all the passwords to access his desktop. He learns nothing about ComputerSoftwareCompany.Com's customers or products. On day two, the firing partner visits Bob with some news. The company is not doing well financially and has to make some cutbacks. Unfortunately for Bob, this means him—he is terminated. Dejected, Bob packs up his cubicle and heads home, but not before picking up a classified section of the newspaper.

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* As this comment goes to press, the Louisiana Supreme Court has handed down its decision in *Swat 24 Shreveport Bossier, Inc. v. Bond*, 2001 WL 754754 (La. 6/29/01). Although that decision resolved certain conflicts in the circuit courts of appeal which are discussed in this comment, readers may find the comment useful in that it provides a comprehensive review of the law of noncompetition agreements up until the *Swat 24* decision.

1. All names and companies in this hypothetical are fictitious.

Bob notices that SoftwareDeveloper.Com is hiring. He interviews with the company and is hired, in fact, under the same terms as ComputerSoftwareCompany.Com had hired him. Bob calls a friend who still works at ComputerSoftware.Com to tell him the good news that he has been hired so quickly. Unfortunately for Bob, his friend informs management at ComputerSoftwareCompany.Com about Bob's new job.

Bob is served the next day with a temporary restraining order, which informs him that ComputerSoftwareCompany.Com plans to enforce the noncompetition agreement he had signed. Bob is outraged! Why should he be prevented from getting a new job in all of Louisiana when he was fired after receiving little or no training? Furthermore, why should he be restricted from working for two entire years? Bob decides to fight this in court, sure that no reasonable court would enforce such an agreement against him.

Bob is greatly surprised when the court enforces the agreement against him. While the court limits the agreement to East Baton Rouge, Ascension, Saint Charles, Saint James, and Orleans Parishes, this is of little consolation to Bob, because SoftwareDeveloper.Com is located in and does business in the same parishes.

Although the result reached by the court seems harsh, it is the result that would most likely be reached by some Louisiana courts today. Louisiana Revised Statutes 23:921[2]

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2. La. R.S. 23:921 (Supp. 2001). The full text of the statute covers restraints of trade with respect to the sale of goodwill, noncompetition agreements, partnerships, franchise agreements, and computer program design. For purposes of this article, only sections A, C, and G are of import. The full text of these sections provides:

> § 921. Restraint of business prohibited; restraint on forum prohibited; competing business; contracts against engaging in; provisions for
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> A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.
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> C. Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. An independent contractor, whose work is performed pursuant to a written contract, may enter into an agreement to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to exceed two years from the date of the last work performed under the written contract.
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> G. Any agreement covered by Subsections B, C, D, E, or F of this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived. In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement.

La. R.S. 23:921.263

governs noncompetition agreements, and courts simply require mechanical adherence to the statute in order to effect an enforceable agreement.

Louisiana courts would not always have reached the same conclusion. Noncompetition agreements have been prohibited by statute since 1934, and such agreements have been deemed violations of public policy.[3] Despite this traditional view of such agreements, the Louisiana legislature was persuaded in 1962, and again in 1989, to amend the statutory provision to allow noncompetition agreements in limited circumstances.[4] The amendments undoubtedly resulted from market pressures and successful lobbying by businesses, as Louisiana employers were disadvantaged because they were unable to protect their competitive advantages when employees chose to terminate employment and began working in direct competition with their former employers. It was unfair for employees or their new employers to benefit at the expense of former employers. The legislature therefore attempted to alleviate this problem by providing exceptions to the general prohibition of noncompetition agreements.[5]

Unfortunately, the courts have applied the statute inconsistently since its adoption. Despite drastic inconsistencies, the Louisiana Supreme Court has denied writs in almost every case. Finally, in the 1997 case of *AMCOM v. Battson*,[6] the Louisiana Supreme Court arrived at the opportunity to clarify at least one issue—whether noncompetition agreements may be reformed. However, the supreme court simply overruled the appellate court's decision and reinstated the trial court's opinion, which had reformed an overly broad agreement. Because no reasons were given, the circuits are again split as to the implications of this decision.

Noncompetition agreements theoretically are invaluable to many types of employers, such as those who provide customer lists and training to their employees. As a result, many employers include them in their employment contracts and, of course, expect them to be enforceable. However, because the courts are inconsistent in their enforcement of such agreements, the employer cannot know whether the agreement will provide any benefit. Moreover, employees who sign noncompetition agreements are sometimes unnecessarily restricted in their post-termination activities.

This article will examine the conflicting policies of noncompetition agreements, the inconsistent manner in which Louisiana courts have treated them, the problems which *AMCOM v. Battson* has created and its implications. The article compares Louisiana's statute and its application to the statutes of Florida and Alabama, the two statutes upon which the legislature based Louisiana Revised Statutes 23:921. This

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3. *See* 1934 La. Acts 484, Act No. 133 (current version at La. R.S. 23:921(Supp. 2001)); *see also* La. R.S. 23:921(A) (Supp. 2001).

4. In 1962, noncompetition agreements were allowed in the employment setting if the employer incurred an expense in the training of the employee or in the advertisement of the business. *See* Historical and Statutory notes of La. R.S. 23:921 (1998). In 1989, agreements not to compete were allowed in the sale of goodwill of a business, in employment contracts, and in partnership dissolutions, if certain elements were satisfied. *See* Historical and Statutory notes of La. R.S. 23:921 (1998); La. R.S. 23:921(B-D) (1998).

5. The general prohibition is found in public policy and codified in La. R.S. 23:921(A) (Supp. 2001).

6. 666 So. 2d 1227 (La. App. 2d Cir.), *reversed*, 670 So. 2d 1223 (1996).

article considers whether noncompetition agreements are in fact necessary to protect employers. Finally, this article offers some solutions to the problems that Louisiana faces with respect to noncompetition agreements.

II. WHY NONCOMPETITION AGREEMENTS ARE GENERALLY DISFAVORED

Although the current trend in Louisiana law is to enforce noncompetition agreements against employees, such agreements were not always favored. For example, prior to 1962 any agreement in which an employee agreed not to compete with his employer after the employment relationship was terminated was unenforceable.[7] When the Louisiana legislature amended the statute in 1962 to allow noncompetition agreements in limited circumstances, the Louisiana courts interpreted the statute so narrowly that no agreement was enforced.[8] Notably, the current Louisiana Revised Statutes 23:291 begins with a general prohibition of all noncompetition agreements.[9] This general aversion to noncompetition agreements is rooted in several concerns: the spectre of involuntary servitude, the restriction of one's ability to breach an inefficient contract, the necessity to issue prohibitory injunctions, and the lack of mutuality in such contracts.

A. Connotation of Involuntary Servitude

When an employee cannot leave his job, for whatever reason, images of shackles, chains, and cruel treatment come to mind. Although indentured servitude once served an important role,[10] after the American Revolution it came to be associated with slavery.[11] Indentured servitude was often a means of perpetuating slavery in the South through the Black Codes, which, among other things, criminalized as vagrants black males who did not enter into employment contracts.[12] Because of this and other oppressive practices, courts became sensitive to attempts by employers to limit an employee's future employment options.[13]

In 1911, the United States Supreme Court in *Bailey v. Alabama*[14] invalidated an Alabama statute that established a presumption of criminal intent to gain money by false pretenses when an employee breached a labor contract without repaying the

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7. La. R.S. 23:921 (1934).

8. *See* La. R.S. 23:921 (1962); Jeffery D. Morgan, Comment, *If At First You Don't Succeed: Louisiana's Latest Statutory Enactment Governing Agreements Not to Compete*, 66 Tul. L. Rev. 551, 557-58 (1991).

9. La. R.S. 23:921 (Supp. 2001).

10. The role of indentured servitude was to provide immigrants with a means of traveling to America. Without the promise to work for up to seven years for their masters, immigrants who could not otherwise finance the voyage would have been unable to emigrate to America. Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 Stan. L. Rev. 87, 120-21 (1993).

11. *Id.* at 126.

12. *Id.* at 127.

13. *See id.*

14. Bailey v. Alabama, 219 U.S. 219, 31 S. Ct. 145 (1911).

monetary advance given by the employer.[15] The Court held that the Thirteenth Amendment did not permit criminalizing the breach of an employment contract.[16] Because contract labor developed against the backdrop of slavery and forced labor, the public began to view contract labor as "unconscionable tyranny."[17]

Although noncompetition agreements are not contract labor per se,[18] one can see how a contract that restricts an employee's post-employment activities suggests oppression, particularly considering that an employer arguably gains more from a noncompetition agreement than the employee. Furthermore, employees are often in a weak bargaining position at the time they are presented with noncompetition agreements. In light of this history, skepticism regarding noncompetition agreements is understandable.

B. Theory of the Efficient Breach

The economics theory of efficient breach "suggests that society is better off permitting resources tied up by contracts to move to the party who most values them when circumstances change."[19] Thus, if A, who is bound to a contract with B, discovers a more profitable deal with C, and the damages for breach of the contract with B will not be greater than the increase in profits resulting from the contract with C, the theory of efficient breach encourages A to breach the contract with B and enter into a contract with C. The theory suggests that not breaching the contract results in inefficiency.[20] Thus, an employee should be able to change jobs if it is the efficient thing to do.

Noncompetition agreements discourage the efficient breach when they restrict an employee from entering into employment with a competitor who may value the employee's services more. Employers who want to hire away employees subject to noncompetition agreements may, of course, pay damages on behalf of the new employee to the first employer to avoid litigation, if the first employer is willing and if he can translate the damages into an accurate and agreeable dollar figure.[21] If the employment contract contains a buyout clause, the new employer may simply pay the amount stipulated in the contract without fear of litigation against the employee or the

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15. Wonnell, *supra* note 10, at 127-28 (citing Bailey v. Alabama, 219 U.S. 219, 31 S. Ct. 145, 52-53) (1911).

16. *Id.* at 128 (citing *Bailey*, 219 U.S. at 244-45, 31 S. Ct. at 152-53).

17. *Id.* at 131.

18. Rather, they merely limit the activities of an employee after the employment relationship has ended.

19. Wonnell, *supra* note 10, at 100.

20. *Id.* at 100-01.

21. Litigation for breach of noncompetition agreements is generally by a past employer against his former employee. Because an employee may be unable or unwilling to pay monetary damages, the new employer may have to pay the damages if he wants to hire the employee. Furthermore, a former employer may sue a new employer directly for intentional interference with contract, if the jurisdiction recognizes the tort. Louisiana currently recognizes the tort of intentional interference with contract, but only in limited circumstances. *See generally* 9 to 5 v. Spurney, 538 So. 2d 228 (La. 1989).

employer; however, buyout clauses are rare.[22] The uncertainty of monetary damages plus litigation costs lends itself to making inefficient what would otherwise be an efficient breach, thereby restraining trade and competition.

C. Reluctance to Issue Prohibitory Injunctions

Noncompetition agreements often require a court-issued injunction prohibiting the defendant-employee from working for the competitor or otherwise competing with the former employer. However, courts are generally reluctant to issue prohibitory injunctions as a remedy for breach of contract claims where no noncompetition agreement is present, granting them only in exceptional circumstances.[23] For example, courts may issue injunctions in the absence of noncompetition agreements when the employee's services are unique or extraordinary, thereby making legal remedies inadequate.[24] Some courts have explained that their reluctance to issue injunctions stems from an aversion to imposing involuntary servitude.[25] Moreover, courts are disinclined to issue injunctions where the employee who breached is readily replaced in the labor market.[26] Some courts refuse to enforce noncompetition agreements when a prohibitory injunction will be necessary.

D. Lack of Mutuality

Some commentators argue that noncompetition agreements are inappropriate in an at-will employment relationship because of a lack of consideration and mutuality of performance.[27] Although some courts find continued employment sufficient consideration for the signing of a noncompetition agreement, it has been argued that this reasoning is flawed.[28] While the employer can still fire the employee, the

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22. Buyout clauses are most often used in employment contracts with professional athletes and coaches. An example is the liquidated damages provision that was contained in Coach Gerry DiNardo's coaching contract with Vanderbilt. In the contract, DiNardo agreed to reimburse Vanderbilt his net salary multiplied by the number of years remaining on his contract if he left and was employed by another person or institution prior to the expiration of his contract. Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 753-54 (6th Cir. 1999). Including buyout clauses in every employment contract might alleviate some of the problems with noncompetition agreements, as will be discussed hereinafter.

23. Wonnell, *supra* note 10, at 93.

24. *Id.* at 93-94. An injunction is an equitable remedy; equitable remedies come into play only when legal remedies are inadequate. *Id.* at 94.

25. *Id.* at 94. The involuntary servitude arises when the employer is prohibited from competing, and must therefore return to the employment of the first employer in order to earn a subsistence.

26. *Id.* at 95.

27. *See, e.g.* Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment is At-Will: Reformulating the Analysis*, 2 Employee Rts. & Employment Pol'y J. 95 (1998). Louisiana does not require consideration to have a binding contract. Rather, it requires the often more easily satisfied lawful cause to have a legally enforceable obligation. Although cause and consideration are different, they are generally analogous. For the present purposes of understanding the general reasoning as to why noncompetition agreements are disfavored, the terms are used interchangeably.

28. *Id.* at 104. Note that Louisiana courts find continued employment sufficient cause. *See, e.g.*

employee no longer has the freedom to leave and to find the same kind of job with a different employer.[29] Moreover, after an employee signs a noncompetition agreement, an employer has a valuable asset in that the employee will be unable to compete, while the employee has nothing more than possible continued employment.[30] The former is a legally enforceable promise while the latter is a legally unenforceable expectation; thus, no mutuality of performance is present and the consideration is insufficient.[31]

To avoid these problems, some courts have required employment for a reasonable or substantial period as a precondition to enforcement of the noncompetition agreement.[32] However, this approach does not alleviate the lack of mutuality of performance, as the employer still has the legally enforceable noncompetition agreement while the employee has merely a legally unenforceable expectation.[33] Other courts have required that some benefit be bestowed upon the employee for the noncompetition agreement to be supported by valid consideration.[34] The problem with this approach is that the court must determine whether the benefit was given for signing the noncompetition agreement or simply to reward the performance of work-related duties.[35] Either case breeds uncertainty as to whether the noncompetition agreement will be upheld, as the court will make this determination with the benefit of hindsight.

At least one commentator has suggested that noncompetition agreements should be prohibited in employment at-will relationships in order to avert the abuse of the power a noncompetition agreement allows the employer to exercise.[36] Instead, such agreements should only be allowed if an employer gives up his right to terminate the employee for any reason and agrees not to terminate the employee, except for just cause.[37] In such a situation, the employee would receive more job security in

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Cellular One v. Boyd, 653 So. 2d 30, 34 (La. App. 1st Cir.), *writ denied,* 660 So. 2d 449 (1995).

29. Staidl, *supra* note 27, at 104-05.

30. *Id.*

31. *Id.* The mutuality of performance theory has been discredited because one performance may be the cause of multiple promises. *See* Willborn et al., Employment Law Cases and Materials 66-67 (2d ed. 1998) *(citing* Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will,* 52 Fordham L. Rev. 1082, 1098-99). However, the fact that the performances are unequal and the employer is generally in a stronger bargaining position sheds light on why courts are often hesitant to enforce noncompetition agreements.

32. Staidl, *supra* note 27, at 105 (citing Zellner v. Conrad, 183 A.D. 2d 250, 589 N.Y.S. 2d 903 (1992).

33. *Id.* at 106. The employee's promise is unenforceable because the employee does not automatically have a right to sue his employer for firing him. The employer may fire the employee-at-will for good reason, no reason at all, or even bad reasons, subject to the limits of contract and tort law. Steven L. Willborn et al., Employment Law Cases and Materials 47 (2d ed. 1998).

34. Staidl, *supra* note 27, at 107 (citing Sanborn Mfg. v. Currie, 500 N.W.2d 161 (Minn. Ct. App. 1993)).

35. *Id.*

36. *Id.* at 112.

37. *Id.* at 118. It is understood that employers cannot in practice terminate for any reason. Of course they cannot terminate for reasons which would violate public policy, such as on grounds of race or sex.

exchange for the agreement not to compete after the employment relationship ends.[38] Furthermore, an employee with a just-cause provision in his employment contract could sue for damages if the employer fired him without just cause, just as the employer could sue for damages if the employee breached the noncompetition agreement. Courts might find the enforcement of such noncompetition agreements to be equitable, and therefore might regularly enforce such agreements, if the employee also has a legal remedy in the event that the employer breaches the employment contract by terminating him without just cause.[39] Although such an approach might alleviate the problem of lack of mutuality, other problems still remain, including whether the noncompetition agreement is reasonable under the circumstances and whether the agreement is so essential to the welfare of the employer that the resulting restraint of competition is justified.

E. Benefits to Employees

Although noncompetition agreements are often viewed negatively for reasons discussed above, courts should not always refuse to enforce them. The all out invalidation of any agreement not to compete would disempower employees by denying potential employees some bargaining power when contracting for employment.[40] Employees would lose the ability to bargain for favorable terms in exchange for a promise not to compete if such a promise was not legally enforceable.[41] Even if an employee did not *bargain* for favorable terms, an employer would arguably be more willing to bestow additional benefits on the employee if he knew that his investment in the employee would be protected by an enforceable noncompetition agreement.[42]

III. A BRIEF HISTORY OF LOUISIANA'S LAW ON NONCOMPETITION AGREEMENTS

Before 1934 no law governed noncompetition agreements, and Louisiana courts generally applied a reasonableness standard to determine whether these agreements were enforceable.[43] If, however, the agreement was one involving an employment contract,[44] the courts did not employ the reasonableness standard. Instead, the courts employed a more critical analysis, most often resulting in the nullification of the

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38. *Id.* at 119.

39. *See generally* Steven L. Willborn et al., Employment Law Cases and Materials 67 (2d ed. 1998).

40. Wonnell, supra note 10.

41. *Id.* at 145. Whether an employee actually has the bargaining power to negotiate favorable terms is questionable.

42. For example, an employer who knows a noncompetition agreement will be enforced might provide an employee with employer-financed training or access to customer lists, which would likely increase the salary of the employee.

43. Morgan, *supra* note 8, at 553.

44. Other noncompetition agreements included those concerning the sale of a business, and others.

agreement.[45] Since Louisiana has adopted employment at will, the courts have viewed such noncompetition agreements as weighing too heavily in the employer's favor, as only the employee would be bound at the end of the relationship no matter who severed it. Such agreements therefore lacked consideration.[46]

In 1934 the Louisiana legislature specifically addressed noncompetition agreements in passing Act 133, which declared unenforceable any agreement in which an employee agreed not to compete with his employer after the employment relationship was terminated.[47] The courts "consistently interpreted the statute as providing a broad policy against all agreements not to compete that were made an ancillary to the employment contract."[48]

A 1962 amendment lifted the general prohibition of noncompetition agreements in the employment relationship in two circumstances: "where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in."[49] The statute limited the noncompetition agreement to the same route or territory where the employer engaged in business, and it limited the maximum period to two years.[50] However, the Louisiana Supreme Court in *Orkin Exterminating Co. v. Foti*[51] added a gloss to the statute,[52] requiring the employer to have incurred substantial expenses for the noncompetition agreement to be valid.[53] The court emphasized the right of individuals to better themselves and stressed that employees have uneven bargaining power in relation to employers. The court advocated a restrictive interpretation of the statute. As a result, no court considering the enforceability of noncompetition agreements after *Orkin* found there to be substantial expense such that a noncompetition agreement could be enforced.[54]

The ineffectiveness of the 1962 statute following the *Orkin* decision led the legislature to redraft the statute completely in 1989.[55] It continued the general prohibition of all noncompetition agreements but provided exceptions to the general

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45. *Id.*

46. *Id.* at 554. Again, although Louisiana does not require consideration, courts have in the past used the term interchangeably with cause.

47. La. R.S. 23:921 (1934); *see also* Morgan, *supra* note 8, at 554.

48. *Morgan, supra* note 8, at 554-55 (citing Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254, 263-66 (E.D. La. 1967); Nalco Chem. Co. v. Hall, 237 F. Supp. 678, 681 (E.D. La.), *aff'd*, 347 F.2d 90 (5th Cir. 1965); Marine Forwarding & Shipping Co. v. Barone, 154 So. 2d 528, 530 (La. App. 4th Cir. 1963)).

49. Historical and Statutory notes of La. R.S. 23:921, (Supp. 2001); *see also* Morgan, *supra* note 8, at 555.

50. Historical and Statutory notes of La. R.S. 23:92 (Supp. 2001); *see also* Morgan, *supra* note 8, at 555.

51. 302 So. 2d 593 (La. 1974).

52. The Supreme Court likely added the gloss because of one or more of the reasons discussed *infra* in Part II.

53. Morgan, *supra* note 8 at 557.

54. *Id.* at 557-58.

55. Historical and Statutory Notes of La. R.S. 23:921(Supp. 2001).

rule.[56] Notably, the legislature removed the language requiring that an employer incur some expense for a noncompetition agreement in the employment relationship to be valid.[57] The legislature revised the statute hoping that courts would enforce certain noncompetition agreements.[58]

The statute has essentially remained the same since 1989. However, in 1990 a new subsection was added relating to noncompetition agreements for computer programming, and minor changes were made to clarify that a person includes a corporation and its shareholders. In 1991, a new subsection was added relating to parties to a franchise. In 1995, the legislature added a sentence allowing independent contractors to enter into noncompetition agreements. The last change to the statute came in 1999, when the legislature added a sentence restricting the use of choice-of-forum and choice-of-law clauses in employment contracts or collective bargaining agreements.[59]

IV. APPLICATION OF LOUISIANA REVISED STATUTES 23:921 AFTER THE 1989 AMENDMENT

Apparently, the legislature sought to alter the Louisiana Supreme Court's interpretation of Louisiana Revised Statutes 23:921 in *Orkin* when it amended the statute in 1989.[60] Based on the legislative response to *Orkin*, it might be expected that a greater number of noncompetition agreements would have been upheld by the courts. This, however, was not the outcome as courts struck down many agreements on different rationales. Following is a survey of these decisions, categorized by issue to highlight the bases upon which the courts enforced or refused to enforce noncompetition agreements.

A. Failure to Adequately Define the Employer's Business

Louisiana courts read into Louisiana Revised Statutes 23:921 a requirement that the employer's business be defined. The text of the statute makes no reference to the definition of an employer's business either as it existed prior to the 1989 amendment or after.[61] As a result of this new gloss, noncompetition agreements failing to define the employer's business were held invalid, as will be discussed herein. The courts were perhaps uneasy enforcing noncompetition agreements that would prohibit an

56. *Id.* The exceptions followed the general prohibition.

57. *See* Morgan, *supra* note 8, at 561.

58. *Id.*

59. Historical and Statutory Notes to La. R.S. 23:921 (Supp. 2001). For the full text of the statute as it is currently written see *supra* note 2.

60. *See* Morgan, *supra* note 8, at 561. It has been correctly noted that the 1989 amendment codified a general prohibition of all noncompete agreements, rather than a specific prohibition of noncompetition agreements in the employment setting. *Id.*; La. R.S. 23:921(A)(1) (Supp. 2001); *cf.* La. R.S. 23:921 (1962).

61. *See* La. R.S. 23:921(C) (Supp. 2001).

employee from working in many capacities; the agreements seemed unnecessarily restrictive to protect the employer's interests.

In *Daiquiri's III on Bourbon, Ltd. v. Wandfluh*,[62] the fifth circuit was hesitant to enforce a nôncompetition agreement that would have prevented the employee from working in numerous capacities. In *Daiquiri's*, the plaintiff sought an injunction enforcing a noncompetition agreement that stated: "Employee agrees that he shall not, during any period of time that he performs services for employer or for a period of two years thereafter directly or indirectly engage at any other place of business which is the same or substantially similar to the business covered by this agreement."[63] The agreement defined the business as "the sale of frozen drinks for consumption by the general public."[64] The Fifth Circuit held the agreement null and void. One basis for the court's decision was the overly broad definition of the employer's business.[65] The court refused to enforce the agreement because it would prevent the defendant from selling items like ice cream, malts, and frozen lemonade, and thus would prevent the defendant from working in a number of establishments that did not compete with the plaintiff.[66]

The first circuit in *LaFourche Speech & Language Services, Inc. v. Juckett*[67] similarly found a noncompetition agreement void because it failed to define the employer's business.[68] In that case, the plaintiff-employer sought to enforce a noncompete clause in its employment contract with the defendant-employee.[69] The plaintiff claimed the defendant violated the noncompetition agreement because she began engaging in a business similar to that of the plaintiff subsequent to her termination.[70] The court rejected the plaintiff's argument that the clause was valid under Louisiana Revised Statutes 23:921(C) because the statute does not require a definition of the employer's business. Rather, the court relied on *Daiquiri's III on Bourbon, Ltd. v. Wandfluh* [71] which had held that noncompetition agreements must

62. 608 So. 2d 222 (La. App. 5th Cir. 1992), *writ denied*, 610 So. 2d 801 (1993).

63. *Id.* at 223.

64. *Id.*

65. The overly broad definition was the second reason the court gave. The first reason why the court held the agreement null and void was that it failed to limit the scope of the restraint to specified parishes or municipalities as required by La. R.S. 23:921(C) (Supp. 2001). *Id.* at 224.

66. *Id.* at 225 (citing Ingram Corp. v. Circle, Inc., 188 So. 2d 96, 98 (La. App. 4th Cir.), *writ refused*, 190 So. 2d 232 (1966)). The court stated that Louisiana law requires a noncompetition agreement to specifically define an employer's business. It appears that the court may have been using a "reasonableness standard" to hold the clause invalid due to an overbroad definition of the employer's business.

67. 652 So. 2d 679 (La. App. 1st Cir.), *writ denied*, 654 So. 2d 351 (1995).

68. *Id.*

69. *Id.* at 679.

70. *Id.* The noncompetition clause in the employment context provided the following: Upon the termination of this agreement, voluntary or otherwise, Employee[Juckett] shall, for a period of two (2) years from the date of termination, refrain from carrying on or engaging in a business similar to that of the employer [LSLSI] within the Parishes of LaFourche, Terrebonne, Assumption, St. James, and St. Mary. *Id.* at 680.

71. 608 So. 2d 222, 224 (La. App. 5th Cir. 1992), *writ denied*, 610 So. 2d 801 (1993).

specifically define the employer's business to be valid.[72] The court noted that the nature of LaFourche's business was not described in the contract. However, in its petition, the plaintiff had described itself as a "rehabilitation agency providing therapy services in the field of speech pathology, vocational rehabilitation, occupational therapy, physical therapy, and social work services."[73] If the court had accepted this definition of the plaintiff's business, the defendant would have been prohibited from working in all those areas even though she was hired solely as a speech therapist.[74] The court emphasized that noncompetition agreements are not favored in Louisiana, that in order to be valid they must strictly comply with the statutory requirements, and that they are strictly construed in favor of the employee and against the party seeking enforcement.[75]

B. Lack of Geographical Limitation

Louisiana Revised Statutes 23:921 states that an employee may agree not to compete with or solicit customers of his former employer "within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein."[76] The second and fourth circuits have interpreted this clause to mean that a noncompetition agreement, to be valid, must *specifically* name the parishes and/or municipalities in which it is to have effect.[77] The third circuit interpreted the same clause to mean that a noncompetition agreement, to be valid, has to indicate *in some manner* the parish and/or parishes in which it is to have effect.[78] While both are reasonable interpretations, the first approach allows courts to invalidate agreements that would otherwise be enforced but for a technicality, while the second allows courts to enforce agreements that perhaps ought not be enforced because the employee might not have actually known of the extent of his obligation. Both approaches fail to consider that the most accurate manner of determining the area in which an employee cannot compete or solicit

72. 652 So. 2d at 680. The court in *Daiquiri's* found the noncompetition agreement null because it contained an overly broad definition of the employer's business. *Id.*

73. *Id.* at 681.

74. *Id.*

75. *Id.* at 680. It should be noted that the statute does not specifically require a definition of the business. Rather, the statute states that "any person... may agree with his employer to refrain from... engaging in a business similar to that of the employer." La. R.S. 23:921 (Supp. 2001). If it required a definition, it would likely use the terminology "engaging in a *specified* business," similar to the language later used in the statute, "within a *specified* parish or parishes." La. R.S. 23:921 (Supp. 2001).

76. La. R.S. 23:921(C) (Supp. 2001).

77. The employer must conduct a like business within those specifically named parishes. *See* La. R.S. 23:921(C) (Supp. 2001). The four decisions of the second and fourth circuits interpreting the geographical requirement clause, discussed herein, have required mechanical adherence to the statute.

78. The one decision of the third circuit interpreting the geographical requirement clause, discussed herein, required a more general specification of the area; the agreement did not have to name the parishes or municipalities to be valid.

employees might not even require entire parish restrictions.[79] In addition, the courts seem to have read out the terminology, "or parts thereof,"[80] as no court has considered that an entire parish designation may be overly restrictive.

In *Comet Industries, Inc. v. Lawrence,*[81] the second circuit held a noncompetition agreement unenforceable because it failed to set forth an appropriate geographical limitation. In *Comet*, the plaintiff sought to enforce a noncompetition agreement that would prohibit the defendant from competing anywhere in the continental United States.[82] The court found the provision to be unenforceable because it failed to specify the parishes where Comet conducted business. However, the document contained a savings clause, stating that if any provision in the noncompetition clause was excessively broad, then the clause should be limited to make it compatible with applicable law.[83] The plaintiff asked the court to reform the noncompetition clause to make it applicable in the twenty-four parishes where the company did conduct business. The court, however, refused, stating that noncompetition agreements are disfavored in Louisiana and that any agreement seeking to fit into an exception to the general prohibition of such agreements must strictly conform to the statute.[84]

In *Medivision, Inc. v. Germer,*[85] the fourth circuit affirmed the lower court's denial of injunctive relief because the noncompetition agreement failed to specify geographical limits.[86] In *Medivision*, the agreement prohibited the former employee from competing with employer's competitors during employment and prohibited employee from "providing ophthalmological services within ten miles of any office of the Center [Medivision] existing during the term of the agreement" for one year after termination of the employment contract.[87] The term "center" as used in the agreement was defined as "an eye care center currently located at [X location] and any future additional offices in the Greater New Orleans Area."[88] The court noted Louisiana's strong public policy against contracts prohibiting competition, and the second circuit's statement in *Comet Industries, Inc. v. Lawrence* that such contracts must strictly adhere to the statutory requirements.[89] The court found the "within ten

79. A more accurate method of determining the area to be restricted is discussed in Part X.

80. *See* La. R.S. 23:921(C) (Supp. 2001).

81. 600 So. 2d 85 (La. App. 2d Cir.), *writ denied,* 604 So. 2d 1002 (1992).

82. *Id.* at 87. This is the case which the appellate court in *AMCOM* relied upon, and which Judge Hightower in dissent distinguished. *See* discussion Part V.

83. *Id.*

84. *Id.* The court noted a lack of jurisprudence interpreting the amended 23:921. It found support for its conclusions in *Taquino v. Teledyne Monarch Rubber Company*, where the federal court found that Louisiana law required a territorial limitation to be enforced. *Comet Indus.*, 600 So. 2d at 88 (citing 893 F. 2d 1488 (5th Cir. 1990)). The second circuit likewise found a savings clause ineffective in reviving a noncompetition agreement in *Comet Indus., Inc. v. Colvin*, for the same reasons 600 So. 2d 85, 90 (La. App. 2d Cir. 1992), *writ denied*, 604 So. 2d 1002 (1992).

85. 617 So. 2d 69 (La. App. 4th Cir. 1992), *writ denied*, 619 So. 2d 549 (1993).

86. *Id.* at 70.

87. *Id.* at 72.

88. *Id.*

89. *Id.*

miles of any office" language insufficient to satisfy the statutory requirements. The appellate court agreed with the trial judge that the defendant could not be certain of the extent of the prohibition because the contract prohibited competition with offices not yet established at the time of entering into the contract. Additionally, the contract failed to specify the proscribed areas, and therefore did not meet the requirements of 23:921.[90] The court also rejected the plaintiff's argument that the area was in fact specified because it was limited to the "Greater New Orleans Area." It found that such a term created uncertainty as to the area covered by the agreement.[91] Because the contract was vague and ambiguous and failed to specify territorial limits with clarity, the court held the agreement null and void.[92]

The fourth circuit again showed its reluctance to enforce noncompetition agreements that failed to specify geographical limits in *Water Processing Technologies, Inc. v. Ridgeway*.[93] The case involved a distributorship agreement that included a non-competition clause.[94] The clause contained blanks into which the geographical limitations of the agreement were to be inserted, but the blanks were never completed.[95] The court noted that noncompetition agreements are contrary to public policy, and therefore they must be strictly construed in the favor of the employee.[96] The court consequently found the provision to be void because it failed to specify the geographical limitations required by 23:921. Significantly, while the court noted that limits could be inferred from the rest of the Distributorship Agreement, it refused to reform the contract in the employer's favor.[97]

In *Francois Chiropractic Center v. Fidele*,[98] the fourth circuit again declared null a noncompetition agreement that failed to specify applicable locations. The noncompetition agreement at issue provided that the contractor could not enter into the same or similar practice "of any corporation or organization within a ten (10) mile radius of the outer city limits of New Orleans, Louisiana."[99] The court explained that Louisiana has historically disfavored such agreements. It relied on a U. S. Fifth Circuit opinion that had explained Louisiana's public policy on noncompetition

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90. *Id.*

91. *Id.* The court also found that the term "offices of the Center" to be vague, as the plaintiff was attempting to call one location, which the defendant visited once a month for one-half a day to see patients, an office. *Id.*

92. *Id.* at 73.

93. 618 So. 2d 533 (La. App. 4th Cir. 1993).

94. The trial court had decided that 23:921(C) was applicable because the distributorship created an agency relationship between the parties. *Id.* at 535.

95. *Id.* at 534.

96. *Id.* at 536.

97. *Id.*

98. 630 So. 2d 923 (La. App. 4th Cir. 1993).

99. *Id.* at 924. The agreement provided that Texas law would govern. The court applied Louisiana Civil Code article 3540, which allows the parties to choose what law governs, except to the extent that that law contravenes the public policy of the State whose law would otherwise be applicable. The court first found the clause to be unenforceable under Texas law "because it is broader than necessary to protect appellant's legitimate business interests." *Id.* at 926. The court then continued to examine whether the contract's unenforceability would contravene the public policy of Louisiana.

agreements, particularly that the 1989 amendment of 23:921 did not reverse the public policy disfavoring noncompetition agreements and that any contract seeking to prohibit competition must strictly comply with the statutory requirements.[100] The Louisiana Fourth Circuit Court of Appeals found the agreement unenforceable as it did not "clearly specify that the proscribed area is limited to the municipality of New Orleans."[101]

Remarkably, in 1994 the third circuit in *Allied Bruce Terminix Co., Inc. v. Guillory*[102] upheld a noncompetition agreement in which *no* geographical limitation was specified by parish or municipality name. The case involved a pest control worker who resigned from Terminix and began his own company, despite having signed a noncompetition agreement.[103] The agreement provided that defendant could not compete with the plaintiff for a period of two years following termination of the employment relationship in those parishes where plaintiff worked.[104] Although the agreement did not specifically name the parishes, the trial court found the agreement valid and enforceable because the court itself was able to identify them. Noting that the noncompetition agreement provided expressly that the prohibition was "limited to those parishes in which defendant has worked for Terminix during the term of the agreement," the court held these parishes to be Lafayette and Acadia.[105] Notably, most circuits at this time were *unwilling* to add the names of the parishes to a contract.[106] The appellate court affirmed, finding the contract legally enforceable.[107]

C. Duress and Lack of Mutuality

Threatening to terminate employment if the employee refuses to sign a noncompetition agreement has uniformly been held not to constitute duress. Although an employer may have the legal right to threaten to terminate an at-will employee for not signing a noncompetition agreement, the threat might sometimes be made to secure the agreement even if the employer plans to fire the employee the next day. While courts may conclude that threatening to terminate can never constitute duress, a case-by-case analysis may be more appropriate to prevent inequities from employers abusing the right to threaten termination.

The fourth circuit rejected duress as vitiating one's consent to a noncompetition agreement in *Litigation Reprographics and Support Services, Inc. v. Scott.*[108] In *Scott*, one defendant/employee voluntarily left the employ of the plaintiff/employer while the other two defendants were terminated when the plaintiff discovered they were

100. *Id.* at 926, (citing Team Environmental Servs., Inc. v. Addison, 2 F.3d 124 (5th Cir. 1993)).
101. *Id* at 926.
102. 649 So. 2d 652 (La. App. 3d Cir. 1994), *writ denied*, 650 So. 2d 244 (1995).
103. *Id.* at 653.
104. *Id.*
105. *Id.*
106. *See, e.g.*, Water Processing Technologies, Inc. v. Ridgeway, 618 So. 2d 533 (La. App. 4th Cir. 1993).
107. *Allied*, 618 So. 2d at 649.
108. 599 So. 2d 922 (La. App. 4th Cir. 1992).

planning to quit to begin a competing business with the first defendant. Thereafter, the three defendants incorporated a business that provided similar services as the plaintiff, which they operated in Orleans and Jefferson Parishes in direct competition with the plaintiff.[109] The court found the agreement to be in compliance with the amended Louisiana Revised Statutes 23:921[110] and rejected the defendants' arguments that their consent was vitiated by duress.[111] The court reasoned that because the legislature had changed the law making certain noncompete agreements enforceable, conditioning employment upon the signing of such an agreement could not constitute duress. Furthermore, because the defendants were at-will employees, the plaintiff could terminate them at any time for any reason. Thus, the plaintiff's threat to terminate them did not constitute duress for it had the legal right to do so.[112]

In *Cellular One, Inc. v. Boyd*,[113] the employer brought suit to enforce a noncompetition agreement signed by the defendant-employees. The trial court issued injunctions prohibiting the defendants from working in four parishes and from soliciting customers of Cellular One.[114] On appeal the defendants asserted that the trial court erred in enforcing a noncompetition agreement that lacked mutuality of obligation and failed to provide sufficient consideration.[115] They claimed that noncompetition agreements in an at-will relationship always lack mutuality and have an insufficient cause.[116] The defendants presented an example of the inequities that can arise when an employer utilizes a noncompetition agreement in an abusive manner, such as when an employer hires an employee-at-will one day, fires him the next without cause, and then enforces the noncompetition agreement to restrict him from practicing his profession.[117] The court disagreed and stated that the inequities suggested by defendants were not present in this case.[118] The court stressed that the defendants had successful careers as sales representatives for more than three years and that the cause for them entering into the agreement was continued employment.[119] The court noted that the legislature had already addressed the public policy considerations raised by the defendants when it enacted Louisiana Revised Statutes 23:921; therefore, the court followed the language of the statute "which allows 'any person', including an at-will employee, to enter into a noncompetition agreement."[120]

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109. *Id.* at 922.

110. The text of the agreement was not provided in the case.

111. *Id.* at 923.

112. *Id.* The court did not consider the fact that the employee's at-will status may not theoretically provide cause for the contract.

113. 653 So. 2d 30 (La. App. 1st Cir.), *writ denied*, 660 So. 2d 449 (1995).

114. *Id.* at 31.

115. *Id.* at 32.

116. *Id.* at 34.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The court assumed that the legislature correctly weighed the public policy concerns, but failed to consider that the legislature did not adequately address all those concerns. The court simply stated that the legislature, after dealing with the issue for years, enacted 23:921 and thereby expanded

The court also rejected the defendant's argument that the agreement was vitiated by economic duress. Citing Civil Code article 1962,[121] the court reasoned that the threat of terminating the defendants, something the plaintiff had a legal right to do, could not constitute duress.[122]

Affirming the trial court's enforcement of a noncompetition agreement in *Allied Bruce Terminix Company, Inc v. Guillory*,[123] the third circuit rejected the defendant's argument that his consent had been vitiated by economic duress.[124] The court relied on the holding in *Litigation Reprographics*[125] and Civil Code article 1962[126] in concluding found that the threat of termination of employment did not constitute duress because the plaintiff had the legal right to make the threat.[127] The court also commented that the noncompetition agreement was a condition of employment; as a result, no argument could be made that the agreement was unenforceable for lack of consideration.[128]

D. Treatment of Professionals

Whether or not professionals may enter into noncompetition agreements presents difficult issues. Those in favor of application of noncompetition agreements to professionals argue that professionals are in a stronger bargaining position than nonprofessional employees are, and therefore, professionals should be bound if they choose to enter into such an agreement. However, because a professional bears the bulk of the expense of his training, employers of professionals are likely to have less of a monetary investment at stake than employers of nonprofessionals, and therefore noncompetition agreements may unnecessarily restrict the post-termination activities of professionals. Assuming that the employer needs the protection of a noncompetition agreement, a two-year prohibition may be overly restrictive because the professional would have to leave his profession and enter a new line of work to make a living.[129] The only other option for the professional would be to uproot himself and establish his profession outside the area of restriction, thereby losing his established clientele and

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the use of noncompetition agreements. It noted that paragraph (A) of the statute expresses the strong public policy against such agreements, while paragraph (C) states that any person may enter into such contracts with their employer. *Id.*

121. Louisiana Civil Code article 1962 provides in part, "The threat of doing a lawful act or a threat of exercising a right does not constitute duress." La. Civ. Code art. 1962.

122. *Cellular One*, 653 So. 2d at 35.

123. 649 So. 2d 652 (La. App. 3d Cir. 1994), *writ denied*, 650 So. 2d 244 (La. 1995).

124. *Id.* at 653.

125. 599 So. 2d 922 (La. App. 4th Cir. 1992).

126. For the text of Louisiana Civil Code article 1962, see *supra* note 119.

127. Litigation Reprographics & Support Servs., Inc. v. Scott, 599 So. 2d 922 (La. App. 4th Cir. 1992).

128. *Id.* at 653.

129. Asking an employee, who is capable of working in many capacities, to find a job that does not compete with his former employer, is much less burdensome than asking a professional, who is trained to work in one field, to find a job that does not compete with his former employer.

reputation, an expensive and burdensome choice that is likely unrealistic for those established and comfortable in a particular area.

Some states specifically prohibit the application of noncompetition agreements to professionals.[130] Louisiana Revised Statutes 23:921 prohibits contracts which restrain the exercise of a lawful profession,[131] but the exceptions which follow the general prohibition provide a means of enforcing a noncompetition agreement against certain professionals, unless some other protection exists elsewhere.[132] Louisiana Revised Statutes 23:921(C) allows employees and independent contractors to enter into noncompetition agreements with their employers; professionals are either an employee or an independent contractor. Furthermore, Louisiana Revised Statutes 23:921(D) allows partners of a partnership to enter into noncompetition agreements upon or in anticipation of a dissolution of the partnership; professionals often form partnerships to transact business. Louisiana courts have not addressed the specific issue of whether noncompetition agreements should be applied to professionals.

In *Francois Chiropractic Center v. Fidele*,[133] the fourth circuit held a noncompetition agreement invalid under Louisiana law because it did not specify the geographical limitations.[134] The fourth circuit made no mention of the defendant's status as a professional, and therefore, did not consider whether noncompetition agreements should be applied to professionals. Rather, the court simply stressed the commonly recited phrase that noncompetition agreements must strictly conform to the statute to be enforceable.[135]

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130. For example, Alabama's general statute concerning noncompetition agreements contains a general prohibition of noncompetition agreements as applied to professionals. Ala. Code §8-1-1 (Michie 1993). Accounting, medicine, and veterinary medicine are considered professions for purposes of the statute; these professions are not subject to the exception in subsection (b) of the statute. Malsberger, Covenants Not to Compete, A State by State Survey, 60 (2nd ed., 1996) In addition, although it does not have a statute covering noncompetition agreements generally, Delaware has a statute prohibiting any restriction of doctors to practice medicine. 6 Del. C. §2702 (Michie Repl. 199and therefore 3). The statute does not consider liquidated damages provisions to be noncompetition agreements enforces such provisions if they are reasonable. *Id.* Similarly, Massachusetts has a statute making noncompetition agreements unenforceable against doctors. Massachusetts General Laws chapter 112, §12X (Law. Co-Op. 1991). Massachusetts, however, considers liquidated damages provisions to be unenforceable noncompetition agreements. *Id.* Vermont has a statute prohibiting a school of cosmetology from requiring a person to enter into a noncompetition agreement with the training organization or affiliate. Vt. Stat. Ann. §647(c) (Michie Butterworth Cum. Supp. 1995). Those states which have adopted Model Rules of Professional Conduct Rule 5.6 restrict the application of noncompetition agreements as applied to attorneys.

131. *See* La. R.S. 23:921(A) (Supp. 2001).

132. For example, Rule 5.6 of the Model Rules of Professional Conduct prohibits agreements in which a lawyer's right to practice is restricted after termination of the employment or partnership relationship. Model Rules of Professional Conduct Rule 5.6. Those states which have adopted Rule 5.6 would restrict noncompetition agreements applied to attorneys.

133. 630 So. 2d 923 (La. App. 4th Cir. 1993).

134. *Id.* at 926. *See supra* Part IV.B.

135. 630 So. 2d at 923.

Minge v. Weeks,[136] a fourth circuit decision involving an employment contract between an associate attorney and his law firm, sheds some light on the permissibility of noncompetition agreements as applied to attorneys. In *Minge*, the defendant signed an employment contract with a provision restricting his ability to solicit former clients should he be discharged from the firm or otherwise leave the firm.[137] According to the contract, if the associate did solicit clients he would be required to pay the firm eighty percent of the net attorney fee generated by each client.[138] Instead of Louisiana Revised Statutes 23:921, the court looked to Rule 5.6 of the Rules of Professional Conduct, which provides that a lawyer cannot make a partnership or employment agreement "that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."[139] Noting the purpose of Rule 5.6 to preclude commercial arrangements that interfere with the attorney-client relationship and the ability of a client to choose the counsel of his choice, the court found that the financial disincentive provisions of the agreement, though not directly restrictive, violated the rule.[140] The agreement was thus void and unenforceable as against public policy.[141] The result reached by the *Minge* court evidently aims to protect third persons, not the parties to the agreement. This may suggest that if a third party were adversely affected by a noncompetition agreement, then a court could have an alternate basis for not enforcing the agreement.

The fifth circuit, however, concluded in *Warner v. Carimi Law Firm*[142] that not every financial consequence would amount to a violation of Rule 5.6.[143] The agreement at issue required the plaintiff, who left his law firm and took files, to reimburse the law firm for the advanced costs. Furthermore, if the costs were not reimbursed within ten days of taking over the files, twenty-five percent of the owed monies would be due as liquidated damages.[144] The court distinguished *Minge v.*

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136. 629 So. 2d 545 (La. App. 4th Cir. 1993).

137. *Id.* at 546.

138. *Id.* Although this provision appears to be similar to many other noncompetition/nonsolicitation agreements, the court never used either of those terms to describe the contract. Moreover, the court never even looked to La. R.S. 23:921 to decide the case.

139. *Id.* at 547.

140. The court relied on the case of *Jacob v. Norris, McLaughlin & Marcus*, which used the ABA Code of Professional Responsibility, from which Louisiana's Rules of Professional Conduct are derived, to reach a similar result. *Id.* (citing 607 A.2d 142, 146 (N.J. 1992)).

141. 629 So. 2d at 547. *Cf.* Winston v. Bourgeois, Bennett, Thokey and Hickey, 432 So. 2d 936 (La. App. 4th Cir. 1983). In *Winston*, the 1962 version of La. R.S. 23:921 applied. The case involved a noncompetition clause in a partnership agreement that required a withdrawing partner to compensate the partnership with a percentage of fees as a type of liquidated damages. The court upheld the agreement, noting that the agreement did not restrict the withdrawing partner's ability to practice his profession; he simply had to compensate his former partners if he chose to do so. The court also noted that he entered the partnership contract freely, and that he received valuable benefits as a partner. If he did not want to be subject to the noncompetition agreement, he could have remained an employee. *Id.* at 940.

142. 678 So. 2d 561 (La. App. 5th Cir. 1996).

143. *Id.* at 565.

144. *Id.* at 563.

Weeks because the agreement did not penalize the attorney by making him pay most of the generated fees to his former partners/partnership, but instead simply shifted the burden of financing the cases to the attorney who took over the files.[145] In addition, the liquidated damages provision amounted to damages for delay and was enforceable.[146] The court found that a client's right to choose his attorney was not subverted, and therefore the underlying policy of Rule 5.6 remained protected.[147]

E. Summary of Decisions by Circuit and Miscellaneous Issues Presented by Noncompetition Agreements

All circuits require technical adherence to the statute and all emphasize that noncompetition agreements are against public policy and that noncompetition agreements are to be strictly construed in the favor of the employee. However, the circuits conflict on other issues. A brief summary of decisions from each circuit follows to accentuate the differing policies developed by each circuit to evaluate noncompetition agreements.

The first circuit has not established a clear policy towards noncompetition agreements. It refuses to enforce agreements that fail to comply with "statutory requirements" by not including a definition of the employer's business.[148] Because the statute does not require a definition of the employer's business, the first circuit perpetuates the judicial of gloss to Louisiana Revised Statutes 23:921 and thereby shows an unwillingness to enforce noncompetition agreements that unnecessarily restrict the activities of an employee. However, in *Cellular One*, the first circuit upheld an agreement which did comply with the statutory requirements; in so doing the court rejected the arguments that noncompetition agreements are inappropriate in an at-will employment relationship.[149]

The second circuit has denounced reformation as being in violation of public policy. In *Comet Industries, Inc. v. Lawrence,* the agreement was unenforceable because it did not specify the parishes where Comet conducted business; the court specifically refused to reform the contract pursuant to a savings clause.[150] The court reached the same conclusion in *Comet Industries, Inc. v. Colvin*, approving the trial court's conclusion that reforming an overbroad agreement would be contrary to public policy.[151]

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145. *Id.* at 565.

146. *Id.*

147. *Id.*

148. LaFourche Speech & Language Servs., Inc. v. Juckett, 652 So. 2d 679 (La. App. 1st Cir.), *writ denied*, 654 So. 2d 351 (1995) (no definition of employer's business). Note that the statute does not require a definition of the employer's business.

149. Cellular One, Inc. v. Boyd, 653 So. 2d 30 (La. App. 1st Cir.), *writ denied*, 660 So. 2d 449 (1995) (duress not an issue; cause is continued employment).

150. Comet Indus., Inc. v. Lawrence, 600 So. 2d 85, 87 (La. App. 2d Cir.), *writ denied,* 604 So. 2d 1002 (La. 1992).

151. *Id.* at 89.

Although only deciding one case concerning noncompetition agreements, the third circuit has demonstrated that it is willing to enforce noncompetition agreements as long as they comply with the spirit of Louisiana Revised Statutes 23:921. In *Allied Bruce Terminix Co., Inc. v. Guillory*, the court upheld an agreement that did not specifically name the parishes in which it was to apply; the court itself identified the parishes from the context of the agreement and enforced the agreement against the former employee.[152] Arguably, this was a type of reformation which intimated the result of *AMCOM v. Battson*. Every other circuit requires the agreement to specifically name the applicable parishes or municipalities for the agreement to be enforceable.

The fourth circuit seems to disfavor noncompetition agreements. It requires agreements to specifically name the applicable parishes or municipalities, holding invalid one agreement that failed to do so.[153] An agreement that fails to specify the parishes by failing to fill in the blanks on a form noncompetition agreement was also held invalid, and the court stated it would not reform the contract even though the parish was determinable, thus showing an aversion to reformation.[154] Yet another agreement was held invalid for failing to specify the applicable parishes; the court concluded that "miles-radius" language does not satisfy the statutory requirements of specifying the applicable parishes or municipalities.[155] It refused to enforce noncompetition agreements against one class of professionals, attorneys; however, the court made no indication that it will refuse to enforce noncompetition agreements against other professionals.[156] It upheld an agreement that complied with the statutory requirements, rejecting the argument that economic duress vitiated consent.[157]

The fifth circuit rendered one decision concerning noncompetition agreements, refusing to enforce a noncompetition agreement because it created too broad a restriction on the defendant's employment possibilities and because it did not adequately define the business of the employer.[158] The requirement of a definition of the employer's business perpetuated the gloss added by the courts to Louisiana Revised Statutes 23:921. The fifth circuit noted that it would restrict the application of "noncompetition agreements" to attorneys because of Rule 5.6 of Louisiana's Rules of Professional Conduct, but would enforce provisions that did not interfere with the right of a client to choose his attorney.[159]

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152. 649 So. 2d 652 (La. App. 3d Cir. 1994), *writ denied*, 650 So. 2d 244 (1995).

153. Medivision, Inc. v. Germer, 617 So. 2d 69 (La. App. 4th Cir.), *writ denied*, 619 So. 2d 549 (1993).

154. Water Processing Technologies, Inc. v. Ridgeway, 618 So. 2d 533 (La. App. 4th Cir. 1993).

155. Francois Chiropractic Ctr. v. Fidele, 630 So. 2d 923 (La. App. 4th Cir. 1993).

156. Minge v. Weeks, 629 So. 2d 545 (La. App. 4th Cir. 1993). *See also* Francois Chiropractic Ctr. v. Fidele, 630 So. 2d 923 (La. App. 4th Cir. 1993). In *Fidele*, where the court, although applying a noncompetition agreement to a professional/chiropractor, did not address whether noncompetition agreements should be applied to professionals.

157. Litigation Reprographics and Support Services, Inc. v. Scott, 599 So. 2d 922 (La. App. 4th Cir. 1992).

158. Daiquiri's III on Bourbon, Ltd. v. Wandfluh, 608 So. 2d 222 (La. App. 5th Cir. 1992), *writ denied*, 610 So. 2d 801 (1993).

159. Warner v. Carimi Law Firm, 678 So. 2d 561 (La. App. 5th Cir. 1996).

V. *AMCOM V. BATTSON*: A TURNING POINT

Prior to the *AMCOM* decision, most courts required strict compliance with Louisiana Revised Statutes 23:921 for noncompetition agreements to be enforceable. While other jurisdictions had addressed whether reformation was possible in concompetion agreements, the Louisiana Supreme Court had not. In *AMCOM*, the Louisiana Supreme Court briefly addressed the issue, yet left many related issues unresolved.

A. The Appellate Court Decision

In *AMCOM of Louisiana, Inc. v. Battson*[160] the plaintiff sought to enjoin the defendant from employment with a competing radio station in the same city after termination.[161] The trial court found that the agreement violated Louisiana Revised Statutes 23:921 because the contract was geographically overbroad in prohibiting Battson from working within a seventy-five mile radius of Shreveport or Bossier City.[162] Because the seventy-five mile provision included entire parishes or parts of parishes that were not specified in the contract, the trial court found the provision to be in violation of the statute. The trial court reformed the contract, apparently pursuant to a severance clause[163] in the contract, deleting the overly broad language and limiting the clause to the geographical area statutorily allowed.[164]

The court of appeals agreed that the provision was geographically overbroad.[165] However, the appellate court reached an opposite conclusion regarding the result of the statutory violation. The appellate court found reformation of the agreement impossible. Relying on the general prohibition of non-competition agreements, the court stated that it could not rewrite the overly broad language by deleting or adding words to make it conform to the statute.[166] The court noted that in enacting Louisiana

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160. AMCOM of Louisiana, Inc. v. Battson, 666 So. 2d 1227(La. App. 2d Cir.), *reversed*, 670 So. So. 2d 1223 (1996).

161. 666 So. 2d. at 1227.

162. *Id.* at 1229. The agreement provided that Battson could not compete in "Shreveport or Bossier City, Louisiana, or in Caddo or Bossier Parishes, Louisiana, or within a seventy-five (75) mile radius of Shreveport or Bossier City, Louisiana." *Id.*

163. The severance clause stated that "if any sentence, paragraph, clause, or combination of the same is in violation of the law in any state where applicable, such sentence, paragraph, clause, or combination of the same alone shall be void..., and the remainder of such paragraph and this Agreement shall remain binding on the parties thereto." *AMCOM*, 666 So. 2d at 1230.

164. *AMCOM*, 666 So. 2d at 1228. Thus, Battson would be prohibited from competing in Shreveport or Bossier City, or in Caddo or Bossier Parishes. *Id.* at 1230.

165. *Id.* at 1229.

166. *Id.* The majority relied in part on their decision in *Comet Indus. v. Lawrence,, writ denied*, 604 So. 2d 1002 (La. 1992), where a non-competition agreement was found geographically overbroad in that it prohibited the defendant from competing anywhere within the continental United States. The agreement contained a savings clause that provided that if any provision were found overly broad, then

Revised Statutes 23:921, the legislature declared that any agreement restraining a person from exercising a lawful trade is null and void, except as provided in the statute.[167] The court therefore required strict adherence to the statute; any deviation would render the *entire* agreement null.

The dissent in *AMCOM* argued that reformation of the contract was appropriate. The dissent stated that *Comet*[168] did not preclude a court from striking language from an agreement to make it acceptable under the statute because that case was distinguishable. In *Comet*, the agreement sought to prevent the defendant from competing with his employer anywhere in the continental United States. As the agreement plainly fell short of the statutory requirement of specifying the parishes where competition was prohibited, the plaintiff requested that the court rewrite the contract to prohibit the defendant from competing in the twenty-four parishes in which it conducted business. The court stated that it required strict adherence to the statute and therefore would not reform the agreement.[169] In *Comet*, had the court severed the language that violated the statute, it would have left no enforceable contract. Unlike the situation in *Comet*, deleting the offending language from the agreement in *AMCOM* would leave a perfectly enforceable contract: Battson would not be able to compete in Shreveport or Bossier City, or in Caddo or Bossier Parishes.[170] The dissent found a marked difference between the request of the plaintiff in *Comet* to rewrite the agreement and the request of the plaintiff in *AMCOM* to sever offensive language. The dissent stated: "The present contract is not one... purposely drafted by an employer expecting the court system to reform an ambiguous provision into the outer limits of the law."[171] Moreover, severing the unacceptable terminology would "avoid the harsh result of nullifying an entire agreement,"[172] and would be more in sync with the general principle of contracts in that an "illegal or immoral provision annuls the contract *only to the extent that the agreement depends upon it.*"[173]

The dissent also argued that a "miles-radius" limitation is not a per se violation of Louisiana Revised Statutes 23:921, reasoning that the purpose of the statute is to limit the agreement to an area in which the employer actually conducts business, and to place the employee on notice of exactly where competition is prohibited.[174] In some circumstances, miles-radius language would better accomplish those two purposes, as when an employer is a radio or television station, for such language best

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they were to be limited and reduced to make it compatible with applicable law. *Id.* at 87 (citing 600 So. 2d 85 (La. App. 2d Cir. 1992)). The plaintiff wanted the court to reform the contract and make it applicable in the twenty-four parishes where the company conducted business. However, the court found that such agreements must strictly conform to the statute, as they are otherwise prohibited by law. *Comet*, 600 So. 2d. at 88. The dissent relied on this same statement, yet reached a different result, as will be discussed herein. *AMCOM*, 666 So. 2d at 1230.

167. *AMCOM*, 666 So. 2d at 1230. *See also*, La. R.S. 23:921(A)(1) (1998 and Supp. 2001).

168. *Comet*, 600 So. 2d at 85.

169. *AMCOM*, 666 So. 2d at 1229 (Hightower, J., dissenting)(citing *Comet*, 600 So. 2d at 88).

170. *Id.* at 1230.

171. *Id.* at 1231.

172. *Id.* at 1230.

173. *Id.* (emphasis added).

174. *Id.* at 1231.

describes the area in which the employer does business.[175] The dissent emphasized that no court had held in any prior cases that miles-radius language was per se a violation. Moreover, miles-radius specifications had been upheld in the courts of Alabama and Florida, the two states that provided the model for Louisiana's current statute.[176] The dissent urged the court to consider "the reasonableness of the entire noncompete agreement under the existing circumstances," which would provide the court a method of invalidating an otherwise valid contract.[177] The dissent ultimately found that in this case the miles-radius provision not only met the requirements of the statute but was reasonable.[178]

B. AMCOM v. Battson*: The Louisiana Supreme Court Decision*

The Louisiana Supreme Court granted writs on March 29, 1996.[179] The text of the supreme court decision provided: "Judgment of the court of appeal is reversed. Judgment of the trial court is reinstated." Justices Calogero and Lemmon would have granted the writ and docketed.

VI. APPLICATION OF LOUISIANA REVISED STATUTES 23:921 AFTER *AMCOM*

Because the supreme court did not offer reasons for its decisions, uncertainty as to the intent of its application was inevitable. Was the dissent of the appellate decision on target? Should complete reformation be allowed, or should only severances be allowed? Is the presence of a savings clause necessary for any type of reformation? Was the decision intended only to rectify problems with the geographical limitations? Is reformation appropriate with only mile-radius type clauses? These questions are only a few of those raised by the supreme court decision.

Many states allow reformation of overbroad contracts. However, the degree of reformation allowed varies from state to state. Some states have adopted the "blue pencil" approach, which allows courts to strike provisions and enforce the remainder.[180] Others have adopted the "reasonable alteration" approach, which allows a court to reform a contract so that it reflects the intent of the parties at the time of contracting.[181] Some states do not allow reformation in any circumstance.[182]

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175. *Id.*

176. *Id.* at 1232.

177. *Id.*

178. *Id.*

179. AMCOM v. Battson, 670 So. 2d 1223 (La. 1996).

180. Arizona, for example, has adopted the "blue pencil" approach. Malsberger, *supra* note 132, at 109-110 (citing Olliver/Pilcher Ins. v. Daniels, 715 P.2d 137 (Ariz. 1986).) This is also the approach of the Restatement (Second) of Contracts. *Id.* The Louisiana Second circuit Court of Appeal appears to have adopted a "blue pencil" approach. *See,e.g.* Summit Inst. for Pulmonary Med. and Rehab., Inc. v. Prouty, 691 So. 2d 1384 (La. App. 2d Cir.), *writ denied*, 701 So. 2d 983 (1997); Swat 24 Shreveport Bossier, Inc. v. Bond, 759 So. 2d 1047 (La. App. 2d Cir.), *writ granted*, 769 So. 2d 1217 (2000).

181. Alaska has adopted the "reasonable alteration" approach. Malsberger, *supra* note 132, (citing

Although it is clear from *AMCOM* that Louisiana allows reformation, it is not clear whether Louisiana has adopted the "blue pencil" approach, the "reasonable alteration" approach, or some variation thereof.

Although *AMCOM* dealt only with the issue of reformation, the fact that the Louisiana Supreme Court allowed reformation of a noncompetition agreement so that it could be enforced against an employee perhaps signified a shift towards favoring noncompetition agreements. Not all lower courts appeared to be ready for such a shift, as will be discussed below. A survey of the post-*AMCOM* decisions follows.

A. Failure to Adequately Define the Employer's Business/ Failure to State What Employee is Prohibited from Doing

After *AMCOM*, the lower courts have not taken a uniform policy to the enforcement of noncompetition agreements. The second circuit has interpreted Louisiana Revised Statutes 23:921 narrowly, such that an employer is limited in what he may restrict his employees from doing after termination of employment.[183] The third circuit, on the other hand, has concluded that an employer may prohibit his employee from working for a competitor in any capacity.[184] The position of the fourth circuit falls somewhere in between, allowing an employee to work for a competitor but restricting the jobs that may be held when employed by a competitor.[185] The third circuit has removed the judicial gloss from Louisiana Revised Statutes 23:921 and no longer requires a definition of an employer's business.[186] The first circuit has conditioned that conclusion by stating that if an agreement does contain a definition, it may not prohibit a former employee from performing services not provided to the former employer.[187]

In *Summit Institute for Pulmonary Medicine and Rehabilitation, Inc. v. Prouty*,[188] the second circuit closely examined Louisiana Revised Statutes 23:921 and its meaning when faced with a noncompetition agreement restricting a former employee from working in a number of capacities. The defendant, who had held a position in Summit's business development and marketing department, had signed a noncompetition agreement prohibiting him from holding a job as an officer, director,

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Data Mgmt. v. Greene, 757 P.2d 62 (Alaska 1988)). The third circuit seems to have adopted a "reasonable alteration" approach. *See, e.g.* Petroleum Helicopters, Inc. v. Untereker, 731 So. 2d 965 (La. App. 3d Cir.), *writ denied*, 747 So. 2d 40 (1999).

182. Arkansas does not allow reformation of overbroad provisions. Malsberger, *supra* note 132, at 124-25, (citing Rector-Phillips-Morse, Inc. v. Vroman, 489 S.W.2d 1 (Ark. 1973). Nor does Georgia.) *Id.* at 316, (citing Drumheller v. Drumheller Bag & Supply, 420 S.E.2d 331, 334 (Ga. Ct. App. 1992)).

183. *See Prouty*, 691 So. 2d at 1384; *Bond*, 759 So. 2d at 1047.

184. *See* Moreno & Assoc. v. Black, 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999).

185. *See* Scariano Brothers, Inc. v. Sullivan, 719 So. 2d 131 (La. App. 4th Cir.), *writ denied*, 727 So. 2d 452 (1998).

186. *See* Moores Pump & Supply, Inc. v. Laneaux, 727 So. 2d 695 (La. App. 3d Cir. 1999).

187. *See* Baton Rouge Computer Sales, Inc. v. Miller-Conrad, 767 So. 2d 763 (La. App. 1st Cir. 2000).

188. 691 So. 2d 1384 (La. App. 2d Cir.), *writ denied*, 701 So. 2d 983 (1997).

partner, employee, or consultant with a competitor for one year after the end of the employ.[189] After closely analyzing the words of the statute, the court interpreted the two restraints listed in Louisiana Revised Statutes 23:921(C)[190] to allow the employer to prevent a former employee from doing two things: (1) opening his own competing business; and (2) being employed in a competitor's business in a position where he solicits the customers of his former employer.[191] The court acknowledged that the statute could be interpreted differently, but refused to enforce the agreement.[192] Moreover, the court refused to reform the contract pursuant to *AMCOM* because it would have to rewrite the provision into the outer limits of the law, thereby giving the employer the most protection the law allows rather than that for which the employer bargained. In addition, if the court deleted the offensive section, no enforceable provision would remain.[193] The narrow interpretation of Revised Statutes 23:921 suggests that the second circuit would not adopt a policy *favoring* noncompetition agreements.[194]

The second circuit found another agreement unenforceable in *SWAT 24 Shreveport Bossier, Inc. v. Bond*.[195] The court followed the rationale of *Summit* and again found the agreement, which would have prevented the defendant from holding a position as an "officer, employee, director, agent or consultant of any business which is in direct or indirect competition with SWAT 24," to be overbroad. Such a restriction would prevent the defendant from working for a company who happened to compete with the plaintiff, even if the position held would not put the former employer at a disadvantage. The court deleted the overbroad language and found that nothing remained in the contract to prohibit the defendant's conduct.[196] The court

189. *Id.* at 1385.

190. The two restraints of Section C are: (1) that an employee may agree to refrain from carrying on or engaging in a business similar to that of the employer, and (2) that an employee may agree to refrain from soliciting customers of the employer. La. R.S. 23:921 (Supp. 2001). For the full text of Section C, see *supra* note 2.

191. *Prouty*, 691 So. 2d. at 1387. It seems that the court was looking to the purpose of the statute, which is undoubtedly to protect the employer from having his employee compete with him. The second circuit's interpretation of La. R.S. 23:921 appears to be consistent with that purpose in that it only limits the defendant/employee from working in positions that affect the competitive advantage of the former employer.

192. *Id.*

193. *Id.* at 1388-89. The court has interpreted *AMCOM* to only require reformation by severing clauses and enforcing the remainder, much like the dissent had concluded at the appellate level of *AMCOM*. The court here distinguished *AMCOM* because once the offensive sections were deleted, no enforceable provision remained.

194. It is possible that the reason for interpreting the statute so narrowly was a response to *AMCOM*. The second circuit may have been opposed to reformation because of the power it would give employers. Because the Louisiana Supreme Court affirmed reformation in certain instances in *AMCOM*, the second circuit may have wanted to find a way to limit that power, and therefore interpreted the statute narrowly so that employers would not be able to enforce noncompetition agreements against many employees.

195. 759 So. 2d 1047 (La. App. 2d Cir.), *writ granted*, 769 So. 2d 1217 (2000). The Louisiana Supreme Court had not published a decision at the time of the writing of this article.

196. *Id.* at 1052.

noted that it has maintained a narrow interpretation regarding noncompetition agreements.

In *Scariano Brothers, Inc. v. Sullivan*,[197] the fourth circuit upheld a noncompetition agreement that was similar to the one the second circuit struck down in *Summit*.[198] The court noted that the courts of the state have been consistent in construing such agreements in the employee's favor, regardless of whether the 1989 revision signified a shift in public policy.[199] The defendant argued that the agreement was overly broad because it prevented him from working in any capacity for a competitor, as the injunction prevented him from rendering any services to a competitor.[200] He relied on *Summit*, claiming it stood for the proposition that an employee should not be prohibited from doing any and all types of work for a competitor.[201] The appellate court, however, found that *Summit* was illogical in concluding that "the statutory language only prohibits an employee from conducting his/her own business in competition with a former employer."[202] The court declined to follow *Summit* and deleted the provision that prevented the defendant from rendering services to a competitor, citing *AMCOM*.[203] The decision allowed the defendant to work for the competitor, so long as he did not engage in a business similar to that of his former employer.[204]

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197. 719 So. 2d 131 (La. App. 4th Cir.), *writ denied*, 727 So. 2d 452 (1998).

198. The agreement in Scariano provided:

> Employee and the Company further expressly acknowledge that the Company Business Area includes the parishes and counties named above. Employee will not, during the term of this Agreement and for a period of two years from the date of the termination of his employment, whether as owner, principal, agent, partner, officer, employee, independent contractor, consultant, stockholder, licensor or otherwise, alone or in association with any other person, directly or indirectly (i) solicit any customers of the Company within the Company Business Area, (ii) carry on, be engaged or take part in the Company's Business or in a business similar thereto within the Company's Business Area, or (iii) render services to or own, share in the earnings of, or invest in the stock, bonds or other securities of any other person or entity directly or indirectly engaged in the Company's Business or in a business similar thereto within the Company Business Area; provided, however, that Employee may own passive investments in the securities of any similar business (but without otherwise participating in such similar business) if such securities are listed on any national or regional securities exchange or are registered under Section 12(g) of the Securities Exchange Act of 1934, as amended.

Id. at 134-35. *But see supra* note 193 and accompanying text.

199. *Id.* at 134. Although the courts consistently recited that noncompetition agreements are strictly construed in the employee's favor, this was not always the case. If it were, the fourth circuit may have found the threat of termination duress in *Litigation Reprographics*, and the first might have found there to be lack of cause in an at-will employment relationship in *Cellular One*. After *AMCOM*, though courts still recite that noncompetition agreements are strictly construed in the employee's favor, very few actually were because courts reformed and enforced them.

200. *Id.* The defendant relied on *Summit Institute for Pulmonary Medicine and Rehabilitation, Inc. v. Prouty* 691 So. 2d 1384 (La. App. 2d Cir.), *writ denied*, 701 So. 2d 983 (1997).

201. *Scariano*, 719 So. 2d at 134.

202. *Id.*

203. *Id.* at 135.

204. This decision simply modified the *Summit* decision. While the *Summit* decision only prohibited an employee from opening his own competing business or from working for the competitor

In *Moores Pump and Supply, Inc. v. Laneaux*,[205] the third circuit upheld a noncompetition agreement that did not contain a definition of the employer's business. The court found the statute did not require one and that the parties to the agreement knew what business Moore conducted.[206] This conclusion accurately reflects the text of the statute, which does not require a definition of the employer's business to be valid.[207] The court, without stating that it was doing so, removed the gloss from the statute, which had been added to the statute in cases prior to *AMCOM* and which required a definition of the employer's business to be valid.[208]

The most recent case from the third circuit is *Moreno and Associates v. Black*,[209] wherein the court found a noncompetition agreement enforceable, despite obstacles that would have made it unenforceable in other circuits. The trial judge held the contract unenforceable on two grounds: first, the provision was geographically overbroad;[210] second, the agreement was overbroad in what it prohibited the defendant from doing. The agreement prevented the defendant from directly or indirectly owning, managing, operating, controlling, being employed by, participating in, or being connected "in any manner with the ownership, management, operation, or control" of any competing business.[211] The appellate court reached a different conclusion, finding the prohibition valid. The court relied on the agreement upheld in *AMCOM*, which contained similar language and which the court concluded had been sanctioned by the supreme court.[212] The court further concluded that such a prohibition was clearly authorized by Louisiana Revised Statutes 23:921, which provides in pertinent part that an employee may agree to refrain "from carrying on or engaging in a business similar to that of the employer."[213] Therefore, the court enforced the agreement, finding statutory authorization of the provision.

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in a position that solicited customers of the former employer, this decision adds the restriction that an employee cannot work for a competitor in a position that *competes* with his former employee. Notably, this interpretation of La. R.S. 23:921 allows an employee to work for a competitor so long as he is not competing with his former employer; the First circuit would not allow an employee to work for a competitor in any capacity. *See, e.g.* Moreno & Associates v. Black, 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999).

205. 727 So. 2d 695 (La. App. 3d Cir. 1999).

206. *Id.* at 698.

207. *See* La. R.S. 23:921(C) (Supp. 2001).

208. For cases that required a definition of the employer's business, see *supra* Part IV.A.

209. 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999).

210. *Id.* at 93. The first ground will be discussed *infra* Part C of this section.

211. *Id.* at 93-94.

212. *Id.* at 94. The agreement in *AMCOM* was in fact similar. It stated, "EMPLOYEE will not, as principal, employer-stockholder, co-partner, employee or in any other individual or representative capacity whatsoever, enter into or engage directly or indirectly in the performances of any services for any other radio station or competitor of AMCOM..." AMCOM v. Batson, 666 So. 2d at 1227, 1229 (La. App. 2d Cir.), *reversed*, 670 So. 2d 1223 (La. 1996). Neither the second circuit nor the supreme court addressed the issue of whether the agreement was overly broad in what it restricted the defendant-employee from doing.

213. *Id.* citing La. R.S. 23:921(C) (Supp. 2001).

The first circuit upheld a noncompetition agreement with no definition of the employer's business in *Baton Rouge Computer Sales, Inc. v. Miller-Conrad.*[214] In that case, the plaintiff sought to enjoin the defendant from competing with or soliciting customers of the plaintiff in certain specified parishes for one year after termination of her employment. The trial court held the agreement invalid because (1) it failed to define the plaintiff's business with enough specificity; (2) it did not describe defendant's job duties; and (3) it was not dated.[215] The appellate court disagreed and held the agreement valid, reasoning that the law does not require a definition of the employer's business.[216] It distinguished the case from *LaFourche* and other cases, stating that those cases had all contained overly broad definitions of the business, and would therefore prevent employees in engaging in more activities than were done for the former employer.[217] The court stated: "There can be no doubt that Miller-Conrad knew exactly what type of business she was agreeing not to engage in when she signed the noncompetition agreement."[218] The court therefore remanded the case for trial on the merits.[219] Thus, the first circuit does not require a definition of the employer's business for a noncompetition agreement to be enforceable, but if one is provided in the agreement, it must not be overly broad in what it restricts the employee from doing.

B. Lack of Geographical Limitation

Agreements lacking an appropriate geographical limitation were held invalid less often following *AMCOM.* Both the third and fourth circuits have upheld agreements that would have prohibited the defendant/employee from working in parishes in which the former employer did not carry on a like business by reforming the contract pursuant to a severance clause and striking parishes.[220] The first circuit has been willing to reform overly broad contracts by *deleting* parishes, but would not reform a contract by *adding* parish names, particularly in a contract containing no savings or severance clause.[221] The third circuit differed from the first circuit in that it reformed a noncompetition agreement, which contained no savings or severance clause and which failed to name the applicable parishes, stating that the parishes were identifiable.[222]

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214. 767 So. 2d 763 (La. App. 1st Cir. 2000).

215. *Id.* at 764.

216. *Id.*

217. *Id.* at 765.

218. *Id.*

219. It seems that the trial court will have to determine whether her new job is a similar business as plaintiff's.

220. *See* Dixie Parking Serv., Inc. v. Hargrove, 691 So. 2d 1316 (La. App. 4th Cir. 1997); *see also* Moreno and Associates v. Black, 741 So. 2d 91 (La. App. 3d Cir.), *writ denied,* 745 So. 2d 606 (1999).

221. *See* Turner Prof'l Servs., Ltd. v. Broussard, 762 So. 2d 184 (La. App. 1st Cir.), *writ denied,* 770 So. 2d 356 (2000).

222. *See* Petroleum Helicopters, Inc. v. Untereker, 731 So. 2d 965 (La. App. 3d Cir.), *writ denied,* 747 So. 2d 40 (1999). This decision was much like its decision in *Allied Bruce Terminix Co., Inc. v. Guillory. See supra* Part IV.B.

In *Dixie Parking Service, Inc. v. Hargrove*,[223] the fourth circuit enforced a noncompetition agreement that would have prohibited the defendant from working in parishes where the plaintiff did not actually conduct business. The court recited language that Louisiana has a strong public policy against noncompetition agreements, and that they must be strictly construed in the employee's favor.[224] Despite this policy, the court affirmed the trial court's use of a severability clause contained in the agreement to delete the nine extra parishes and apply the contract to Jefferson and Orleans Parishes, the two parishes where the plaintiff did conduct business.[225] The appellate court analogized the case to *AMCOM* and concluded that the supreme court's reinstatement of the trial court's opinion lent support to the reformation of the contract.[226]

The third circuit again upheld a noncompetition agreement which did not specify precise geographical limitations in *Petroleum Helicopters, Inc. v. Untereker*.[227] There, the plaintiff sought to enforce a noncompetition agreement prohibiting defendant from "carrying on or engaging in a similar business, and refrain[ing] from soliciting customers of PHI within the parishes in which PHI carries on a like business."[228] Although the court recited the typical rhetoric that provisions of noncompetition agreements are strictly construed in the employee's favor, it reversed the trial court's opinion that had held the agreement unenforceable.[229] The court stated: "Although the parishes are not specifically identified by name, they are identifiable. Furthermore, considering [defendant's] position with PHI, he would surely be aware of the parishes in which PHI conducts its business."[230] The court found that the language of the agreement complied with the statutory requirements and therefore enforced the agreement.[231]

The third circuit in *Moreno and Associates v. Black*[232] upheld a noncompetition agreement despite the fact that the provision was geographically overbroad.[233] The

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223. 691 So. 2d 1316 (La. App. 4th Cir. 1997).

224. *Id.* at 1320.

225. *Id.*

226. *Id.* at 1321.

227. 731 So. 2d 965 (La. App. 3d Cir.), *writ denied*, 747 So. 2d 40 (1999).

228. *Id.* at 968 (alterations in original).

229. *Id.*

230. *Id.* The defendant was employed as Vice President and Chief Financial Officer of PHI. *Id.* at 965.

231. *Id.* at 968. The court made no reference to any savings or severance clause. The third circuit upheld another agreement in *Moores Pump and Supply, Inc. v. Laneaux*, 727 So. 2d 695 (La. App. 3d Cir. 1999). In *Moores Pump and Supply*, the plaintiff argued that the contract was geographically overbroad because it prohibited him from working in 43 parishes when the company did not have projects ongoing in every parish. The third circuit court disagreed, reasoning that such a fact did not require a finding that the company was not doing business therein. *Id* at 698. The court found it sufficient that the company solicited customers in all forty-three parishes to satisfy the statutory requirement that the "employer carries on a like business therein." *Id.*; La. R.S. 23:921(C) (Supp. 2001). It is not evident why soliciting customers equates with carrying on a like business, considering projects were not being conducted in all forty-three parishes. This decision further demonstrates the tendency of the third circuit to enforce noncompetition agreements.

232. 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999). Moreno was discussed previously in Part A of this section.

233. *Id.* at 93. The second argument of the defendant, also rejected by the third circuit, was that

clause as written would have prohibited competition in twenty-four specified parishes, two counties in Texas, and all oil and gas drilling platforms or rigs in the Gulf of Mexico located outside the boundaries of Louisiana and Texas.[234] The plaintiff's business was limited to Lafayette and Iberia Parishes. Instead of finding the entire agreement null and void as the trial court had, the appellate court deleted the objectionable references pursuant to the severability clause in the contract.[235]

The first circuit held a noncompetition agreement unenforceable in *Turner Professional Services, Ltd. v. Broussard*.[236] The agreement at issue sought to prevent the defendant from competing with or soliciting customers of the plaintiff "within the state of Louisiana, so long as Turner Professional Services, Ltd., carries on a like business in said areas."[237] Even though the contract did not specify the parishes or municipalities in which the plaintiff operated, the trial court reformed the contract based on the defendant's testimony and enjoined him from competing or soliciting in nine parishes.[238] The appellate court emphasized, as courts prior to *AMCOM* had, that noncompetition agreements must be strictly construed in the employee's favor and that they must strictly adhere to the statutory requirements.[239] The court noted that some courts had allowed reformation of contracts in certain situations, citing *AMCOM* and *Petroleum Helicopters v. Untereker*.[240] However, it declined to follow *Petroleum Helicopters*, which had reformed and enforced a contract in which the parishes were not specified but were identifiable. The court stated: "Revised Statute[s] 23:921(B) [sic] is an exception to Louisiana public policy against noncompetition agreements, and as such must be strictly construed. Simply complying with 'the spirit of 921' is not sufficient."[241] Emphasizing that the contract contained no severability or savings clause, the court held that the contract should not have been reformed and dismissed the plaintiff's suit.[242]

C. Duress

The *AMCOM* decision did not alter the holding that economic duress does not vitiate consent to a noncompetition agreement. For example, the third circuit rejected the argument of duress in *Moores Pump and Supply, Inc. v. Laneaux*.[243] The defendant did not receive the noncompetition agreement until three weeks after his employment commenced.[244] Citing *Litigation Reprographics & Support Services, Inc. v. Scott*,[245]

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the agreement was overbroad in what it prohibited the defendant from doing. *See supra* Part VI.A.

234. *Id.*
235. *Id.*
236. 762 So. 2d 184 (La. App. 1st Cir.), *writ denied*, 770 So. 2d 356 (2000).
237. *Id.* at 185.
238. *Id.*
239. *Id.*
240. *Id.* at 186.
241. *Id.* at 186. The court was referring to La. R.S. 23:921(C), not La. R.S. 23:921(B).
242. *Id.*
243. 727 So. 2d 695 (La. App. 3d Cir. 1999). *See supra* Parts VI.A and VI.B.
244. Moores Pump and Supply, Inc. v. Laneaux, 727 So. 2d 695, 698 (La. App. 3d Cir. 1999).
245. 599 So. 2d 922 (La. App. 4th Cir. 1992).

the court stated that an employee is not under duress if his employer threatens to fire him for not signing a noncompetition agreement.[246] Thus, duress has been rejected as a vice of consent to a noncompetition agreement both before and after the *AMCOM* decision.[247]

D. Reformation

The primary issue in *AMCOM* was whether a noncompetition agreement could be reformed.[248] Because the Louisiana Supreme Court did not give reasons for reinstating the opinion of the trial court (which had reformed the contract), uncertainty arose as to the implications of that decision. For example, the fourth circuit in *Dixie Parking Service, Inc. v. Hargrove*[249] reformed a geographically overbroad noncompetition agreement deleting some parishes and enforcing the remainder.[250] The third circuit similarly reformed an overly broad provision in *Moreno and Associates v. Black*.[251] The third circuit extended the reformation power in *Petroleum Helicopters Inc. v. Untereker*[252] by determining and adding the parishes in which the agreement was to apply.[253] In *Turner Professional Services, Ltd. v. Broussard*,[254] the first circuit refused to follow the fourth circuit, stating that it would reform overly broad contracts by *deleting* offensive provisions but not by *adding* provisions.[255] The second circuit expressed a similar opinion in *Swat 24 Shreveport Bossier, Inc. v. Bond*,[256] when it struck offensive language and found that no enforceable provision remained. Thus, the only consensus is that offensive provisions may be stricken from a noncompetition agreement and the remainder enforced.

The third circuit, in contrast, finds authority for reforming an otherwise invalid noncompetition agreement in the language of Louisiana Revised Statutes 23:921, even in the absence of a savings or severance clause. In *Henderson Implement, Co., Inc. v. Langley*,[257] the court reformed an overly broad contract by deleting language so that it

246. *Id.*

247. *Cf.* Cellular One v. Boyd, 653 So. 2d 30, 34 (La. App. 1st Cir.), *writ denied*, 660 So. 2d 449 (1995).

248. *See* AMCOM of La. v. Battson, 666 So. 2d 1227 (La. App. 2d Cir. 1996), *rev'd*, 670 So. 2d 1223 (1996).

249. 691 So. 2d 1316 (La. App. 4th Cir. 1997). This case was discussed in Part VI.B.

250. *Id.* at 1320-21.

251. 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999). This case was discussed in Parts VI.A and VI.B.

252. 731 So. 2d 965 (La. App. 3d Cir.), *writ denied*, 747 So. 2d 40 (1999). This case was discussed in Part VI.B.

253. *Id.* at 968. The third circuit does not consider this to be reformation. Rather, it concludes that language from which the parishes or municipalities can be identified complies with the statutory requirement. *See id.*

254. 762 So. 2d 184 (La. App. 1st Cir.), *writ denied*, 770 So. 2d 356 (2000). This case was discussed in Part VI.B.

255. *Id.*

256. 759 So. 2d 1047 (La. App. 2d Cir.), *writ granted*, 769 So. 2d 1217 (2000). This decision was discussed in *supra* Part VI.A.

257. 707 So. 2d 482 (La. App. 3d Cir. 1998).

would reflect the clear intentions of the parties. The noncompetition agreement purported to prevent the defendant from competing with "Henderson," defined as "Henderson Implement Co., Inc., its subsidiary and affiliated corporations," in Jefferson Davis Parish.[258] The defendant argued that he was hired to work as a store manager in Welsh, Louisiana only, and that the agreement sought to prevent him from competing with any of Henderson's affiliates, even though he only worked at Henderson's Welsh location.[259] The trial court judge found that the agreement was a standard form where blanks were filled in, that Henderson Implement was the only company of the group of affiliated companies that did business in Jefferson Davis Parish, and the agreement was limited to Jefferson Davis Parish.[260] The trial court therefore had effectively deleted the language "subsidiary and affiliated corporations" from the contract. The plaintiff argued that the trial court erred in deleting this language because the contract, unlike the one in *AMCOM* upon which it relied, contained no severability clause.[261] The appellate court disagreed with the plaintiff, stating that "it is not necessary that an entire agreement containing a provision against public policy be declared null and void."[262] Without offering an explanation, the court stated that Louisiana Revised Statutes 23:921 *clearly allows for the reformation of an otherwise invalid provision.*[263] It cited the text from 23:921(A) and simply concluded that it meant that a court could reform a provision.[264]

E. Summary of Decisions by the Different Circuits

Many more noncompetition agreements have been enforced since *AMCOM's* recognition of reformation as an alternative to invalidation. Inconsistencies, however, do exist in the circuit court decisions. A summary of the decisions from the different circuits follows to elucidate the policies of each circuit toward noncompetition agreements.

The first circuit agrees with the third circuit that Louisiana Revised Statutes 23:921 does not require a definition of an employer's business to be valid.[265] However, if the agreement contains a definition of the employer's business, it cannot be overly broad such that it prevents former employees from engaging in more activities than were performed for the former employer.[266] The only decision by the first circuit with respect to reformation deals with a geographical provision;[267] the language of the decision does not indicate whether reformation is possible with other offensive provisions.[268]

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258. *Id.* at 483. The period was two years after termination. *Id.*

259. *Id.* at 485.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 486. Since the third circuit finds reformation power in the text of La. R.S. 23:921, it is unsurprising that it is willing to add provisions to an otherwise invalid noncompetition clause.

264. *Id.*. For the text of 23:921(A), see *supra* note 2.

265. *See* Baton Rouge Computer Sales, Inc. v. Miller-Conrad, 767 So. 2d 763 (La. App. 1st Cir. 2000).

266. *Id.* at 765.

267. *See* Turner Prof'l Servs., Ltd. v. Broussard, 762 So. 2d 184 (La. App. 1st Cir.), *writ denied*, 770 So. 2d 356 (2000).

268. *Id.* All the cases cited by the court as authority dealt with geographical provisions. For example, the court cited *AMCOM v. Battson*, *Dixie Parking Service, Inc. v. Hargrove*, and *Petroleum*

The first circuit requires the inclusion of a savings or severance clause to permit reformation of geographically overbroad provisions, and will delete but not add provisions in reforming.[269] Furthermore, the first circuit requires that a noncompetition agreement specifically name the parishes or municipalities in which the agreement is to have effect.[270]

The second circuit has taken an extremely restrictive interpretation of Louisiana Revised Statutes 23:921, holding that the statute only allows an employer to prohibit an employee from opening his own competing business and to prohibit an employee from soliciting customers of the former employer.[271] The two cases decided by the second circuit involved provisions that sought to prohibit the defendant-employee from working in *any* capacity for a competitor.[272] Although the court stated that overbroad *geographical* provisions must be reformed and enforced if possible pursuant to *AMCOM*, it was willing to delete provisions unrelated to the geographical provisions.[273] Notably, in both instances deleting the offensive provisions left no enforceable agreement.[274] Perhaps the court would have concluded that reformation is inappropriate outside the context of geographical provisions if an enforceable agreement would have remained. The court did not reach the issue of whether it required an adequate definition of the employer's business.[275]

Compared to the second circuit, the third has adopted a liberal interpretation of both the statute and *AMCOM*. The third circuit holds that the statute does not require a definition of the employer's business to be valid.[276] The third circuit also holds that an employee can be prohibited from working for a competitor in *any* capacity, concluding that such agreements have been sanctioned in *AMCOM*.[277] With respect to geographical provisions, the third circuit deviates from other

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Helicopters, Inc. v. Untereker. *Id.* It is not clear whether the court cited only these cases because the issue before it involved a geographically overbroad provision, or because the court believes that reformation is only appropriate with respect to such provisions.

269. *Id.*

270. *Id.*

271. *See* Summit Institute for Pulmonary Medicine and Rehabilitation, Inc. v. Prouty, 691 So. 2d 1384 (La. App. 2d Cir.), *writ denied*, 701 So. 2d 983 (1997); Swat 24 Shreveport Bossier, Inc. v. Bond, 759 So. 2d 1047 (La. App. 2d Cir.), *writ granted*, 769 So. 2d 1217 (2000).

272. *Id.*

273. *See* Swat 24 Shreveport Bossier, Inc., 759 So. 2d at 1050. The court did not seem to be willing to add provisions; the language of the decision indicated that deleting provisions was the only option. The court noted the third circuit's holding in *Petroleum Helicopters, Inc. v. Untereker*, 731 So. 2d 965 (La. App. 3d Cir.), *writ denied*, 747 So. 2d 40 (La. 1999), that parishes need not be specified if they are identifiable. The court then stated that it, by contrast, has maintained a narrow interpretation regarding noncompetition agreements, suggesting that it would not enforce an agreement that did not specify parishes, even if identifiable. See id. at 1051.

274. *See Summit*, 691 So. 2d at 1389; *Swat 24 Shreveport Bossier, Inc.*, 759 So. 2d 1047 (La. App. 2d Cir.), *writ granted*, 769 So. 2d 1217 (2000).

275. *Swat 24 Shreveport Bossier, Inc.*, 759 So. 2d at 1052.

276. *See* Moores Pump and Supply, Inc. v. Laneaux, 727 So. 2d 695, 698 (La. App. 3d Cir. 1999).

277. *See* Moreno and Associates v. Black, 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999).

circuits in that it does not require the agreement to specifically name parishes or municipalities; rather, the parishes or municipalities simply have to be identifiable in order to comply with 23:921.[278] The third circuit has reformed contracts with overbroad geographic provisions by deleting provisions and enforcing the remainder.[279] It traces reformation power to the text of the statute, which allows it to delete *any* offensive provisions, even in the absence of savings or severance clauses.[280] Notably, the third circuit has enforced every noncompetition agreement that it has considered since *AMCOM*.[281]

The policy of the fourth circuit lies somewhere between that of the second and third. It will allow a former employee to render services to a competitor, as long as such employees are not helping the new employer compete.[282] Regarding the extent of reformation, the fourth circuit has reformed a contract by deleting parishes pursuant to a severability clause;[283] the language of that decision indicates that *any* unenforceable provision could be deleted pursuant to a severability clause.[284]

The fifth circuit has heard only one case since *AMCOM*. Although the agreement was upheld, the case does not shed light on the policy of the circuit.[285]

VII. PROBLEMS WITH LOUISIANA'S APPROACH

A. Requiring Mechanical Adherence to Louisiana Revised Statutes 23:921

Louisiana Revised Statutes 23:921 is the type of statute desired by practitioners because courts simply require mechanical adherence in order for an agreement to be enforceable. Thus, an attorney theoretically can draft a noncompetition agreement

278. *See* Petroleum Helicopters, Inc. v. Untereker, 731 So. 2d 965, 968 (La. App. 3d Cir.), *writ denied*, 747 So. 2d 40 (1999). The third circuit does not consider this to be reformation. It simply concludes that language from which parishes or municipalities can be identified satisfies the statute. The first circuit on the other hand, has suggested that this interpretation is inappropriate, especially when the contract contains no severance or savings clause. *See Turner Professional Servs., Ltd.* v. Broussard, 762 So. 2d 184, 186 (La. App. 1st Cir.), *writ denied*, 770 So. 2d 356 (2000).

279. *See Moreno and Associates*, 741 So. 2d at 93.

280. *See* Henderson Implement, Co., v. Langley, 707 So. 2d 482 (La. App. 3d Cir. 1998).

281. *See* Moores Pump and Supply, Inc. v. Laneaux, 727 So. 2d 695 (La. App. 3d Cir. 1999); Moreno and Associates v. Black, 741 So. 2d 91 (La. App. 3d Cir.), *writ denied*, 745 So. 2d 606 (1999); Petroleum Helicopters, Inc. v. Untereker, 731 So. 2d 965 (La. App. 3d Cir.), writ denied, 747 So. 2d 40 (1999); Henderson Implement, Co. v. Langley, 707 So. 2d 482 (La. App. 3d Cir. 1998).

282. *See* Scariano Brothers, Inc. v. Sullivan, 719 So. 2d 131, 135 (La. App. 4th Cir.), *writ denied*, 727 So. 2d 452 (1998).

283. *See* Dixie Parking Serv., Inc. v. Hargrove, 691 So. 2d 1316, 1320-21 (La. App. 4th Cir. 1997).

284. *Id.* at 1320, The court stated, "The Louisiana Supreme Court recently applied a severability clause to strike *nonenforceable* provisions of a non-competitive agreement" *Id.* (emphasis added).

285. *See* Newton and Associates, Inc. v. Boss, 772 So. 2d 793 (La. App. 5th Cir. 2000), *writ denied*, 2001 WL 50386 (2001). In this case, the defendant-employee argued that the two-year restriction included the time she worked for the plaintiff. The fifth circuit easily ruled in favor of the plaintiff, finding the argument irreconcilable with the plain text of La. R.S. 23:921. *Id.* The pertinent part of the statute states, "not to exceed a period of two years from termination of employment." La. R.S. 23:921(C) (Supp. 2001).

that he knows will be enforced by the court. If the attorney includes a severability or savings clause, a court has the option to delete provisions and enforce the remainder. However, certainty has its disadvantages.

1. Encourages Opportunistic Behavior

Simply requiring technical compliance with Louisiana Revised Statutes 23:291 encourages employers to behave opportunistically. If employers know that noncompetition agreements will be enforced, they have an incentive to require such agreements even when they are unnecesary to protect their interests.[286] They may also draft the agreement as broad as possible, knowing that a court will delete the provisions that should not apply and enforce the remainder against the employee. Furthermore, if an employee does not seek legal advice and challenge the validity of the noncompetition agreement, he will not compete in the stated area. Trade will thereby be restrained unnecessarily.

2. Exclusively Protects the Employer

Requiring mechanical adherence to the statute assumes that the legislature made prudent policy decisions in enacting the statute. [287] The third circuit appears to have made such an assumption, considering the fact tht it has upheld every noncompetition agreement that it has considered post-*AMCOM*. However, the statute as applied is weighted more heavily in the employer's favor; indeed, the legislature may not have adequately addressed the policies it considered in the text of the statute. It may be more appropriate for a court to look to the *purpose* of the statute which is undoubtedly to protect the employer's interests. Looking to the reasonableness of each noncompetition agreement would ensure that the employer's interests were protected and that the employee's rights were not infringed. The second circuit appears to take such an approach, finding a way not to enforce noncompetition agreements when the result seems unjust.

3. Forecloses Balancing of Interests

By simply requiring mechanical adherence, Louisiana courts fail to consider what most other jurisdictions consider in determining the enforceability of noncompetition agreements. The Restatement (Second) on Contracts provides that "[a] promise to refrain from competition. . . is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury

286. *See generally* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. of Legal Stud. 93 (1981).

287. The judiciary should exercise the will of the legislature.

to the public."[288] Louisiana's requirement that the employer must carry on a like business within the specified parishes in order to justify a noncompetition agreement will not always ensure that the employer has a legitimate business interest that requires protection. Moreover, a situation might arise in which enforcement would be entirely unjust, yet the courts have no mechanism to invalidate such agreements based on 23:921.

4. Fails to Consider that Noncompetition Agreements are Unnecessary with Some Types of Training

The mechanical adherence approach allows employers to enforce noncompetition agreements even when they are not needed to protect their interests. It has been argued that noncompetition agreements are unnecessary when an employer provides certain types of training.[289] For example, if an employer provides "specific training," the type of training *only* valuable to the employer providing it, the employer will provide incentives to keep the employee and recoup his investment because that employee is more valuable than others in the labor pool.[290] Furthermore, there is no need to limit the post-employment activities of the employee because the training is of no benefit to other employers.[291]

If, however, the training is "general," such that the training is useful to many employers,[292] the need for noncompetition agreements depends on the cost of the training.[293] If the training is the type that can be financed by the employee,[294] the employer will not be willing to pay for the training because he pays a premium for trained workers. However, the untrained employee will be willing to pay for training because he knows that he will be able to command a premium from other employers.[295] The employee will pay for this training by accepting reduced wages during his training period.[296] Thus, a noncompetition agreement is not needed because the employee is bearing the expense of his training rather than the employer.

Noncompetition agreements are appropriate in a situation where the general training is so expensive that the employee cannot pay for it by accepting reduced wages.[297] An example of such training is the revelation of trade secrets to the employee. Because the employer will have to finance this training, and because the employee will have much incentive to use this training to command a premium wage from other employers, the employer should be able to prevent the employee from

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288. Restatement (Second) of Contracts, § 188 (1981).

289. *See* Rubin & Shedd, *supra* note 286, at 93.

290. *Id.* at 93-94; *citing* Gary S. Becker, Human Capital (1964)).

291. *Id.*

292. *Id.* at 93 (citing Gary S. Becker, Human Capital (1964)).

293. *Id.*

294. One type of training that can be financed by the employee includes learning how to operate machinery.

295. *See* Rubin & Shedd, *supra* note 286, at 96.

296. *Id.*

297. *Id.*

exploiting this information/training. However, such information/training may be protected by other means, such as trade secrets law or by including liquidated damages provisions in employment contracts.[298]

VIII. THE APPROACH OF OTHER JURISDICTIONS

The legislature based Louisiana Revised Statutes 23:921 on statutes enacted in Alabama and Florida.[299] Although the text of Louisiana's statute is similar, the application and results have differed significantly. In order to evaluate better the approach taken by Louisiana courts, a brief examination of Florida's and Alabama's treatment of noncompetition agreements follows.

A. Alabama's Approach to Noncompetition agreements

1. Statutory Requirements and Interpretative Cases

Alabama regulates noncompetition agreements in Alabama Code §8-1-1.[300] Its acceptance of noncompetition agreements follows a general prohibition of any agreement that restrains people from exercising a lawful profession, trade, or business.[301]

The Alabama Supreme Court has established a four-prong test to determine whether a noncompetition agreement that fits within the statutory exceptions is enforceable.[302] The test requires the employer to have a protectable interest, the restriction to be reasonably related to that interest, the restriction to be reasonable in time and place, and that the restriction not impose any undue hardship on the employee.[303] The Alabama Supreme Court has stated that it will uphold noncompetition and nonsolicitation agreements that *partially* restrain trade so long as they are properly restricted as to time, territory, and persons and are supported by ample consideration.[304]

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298. These alternate approaches are discussed *supra* in Parts X.C.1 and X.C.2.

299. Morgan, *supra* note 8, at 552.

300. The statute provides:

> Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void.
>
> One who sells the good will of a business may agree with the buyer and one who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a similar business and to prohibit an employee from soliciting old customers of such employer within a specified county, city or part thereof so long as the buyer, or any person deriving title to the good will from him, or employer carries on a like business therein.

Ala. Code §8-1-1(a) (Michie 1993).

301. *Id.*

302. Ex parte Caribe, U.S.A., Inc., 702 So. 2d 1234 (Ala. 1997), citing James S. Kemper & Co. v. Cox & Assocs., 434 So. 2d 1380, 1384 (Ala. 1983)).

303. *Id.*

304. Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham, 711 So. 2d 995 (Ala. 1998).

With respect to the first prong of the test, an employer "must possess a 'substantial right in its business sufficiently unique to warrant the type of protection contemplated by [a] noncompetition agreement.'"[305] An employer may have a protectable interest "if the employee is in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients."[306] The cases that have addressed this issue focuses on protecting information that is substantial or unique, as well as established relationships with clients.[307] Simple labor skills of an employee are not considered an employer's protectable interest and thus cannot be restricted by a noncompetition agreement.[308]

The second prong requires the restriction be reasonably related to the employer's protectable interest.[309] Since the determination of whether the prong is met is based on reasonableness, the decision is left up to the factfinder.[310]

The third prong requires any restriction to be reasonable in time and place. Because the test again is reasonableness, the court decides if the restriction will be upheld. The restricted area may include all of Alabama or more than Alabama, depending on the circumstances.[311] The time restriction allowed may vary with the circumstances, and may be for a period longer than a year.[312]

The fourth prong, requiring that there to be no undue hardship on the employee, boils down to a reasonableness determination. Courts may consider the age of the former employee, family status, financial obligations, and the amount of training in other fields.[313]

Considering that Alabama is a common law state, the fact that the courts have devised a *judicial* test for determining the enforceability of noncompetition agreements is not surprising. Because the courts have infused a reasonableness standard with the statutory allowance of noncompetition agreements, Alabama agreements are less restrictive on the post-termination activities of an employee than are Louisiana

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305. *Caribe*, 702 So. 2d at 1239 (citing Cullman Broadcasting Co. v. Bosley, 373 So. 2d 830, 836 (Ala. 1979)).

306. Malsberger, *supra* note *132*, at 66, citing Sheffield v. Stoudenmire, 553 So. 2d 125, 126 (Ala. 1989)).

307. *Id.* at 63; Sheffield v. Stoudenmire, 553 So. 2d 125 (Ala. 1989) (information obtained by employee was not so substantial and unique to warrant the noncompetition agreement); Allied Supply Co. v. Brown, 585 So. 2d 33 (Ala. 1991) (confidential information sought to be protected through use of noncompetition agreement); Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 566 (Ala. 1992) (employee had sole contact with policyholders).

308. Malsberger, *supra* note 132 at 66; (citing Greenlee v. Tuscaloosa Office Prod. & Supply, 474 So. 2d 669 (Ala. 1985)).

309. Ex parte Caribe, U.S.A., Inc., 702 So. 2d 1234 (Ala. 1997) (citing James S. Kemper & Co. v. Cox & Assocs., 434 So. 2d 1380, 1384 (Ala. 1983)).

310. *Id.*

311. Malsberger, *supra* note 132, at 67 (citing Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 566 (Ala. 1992)).

312. Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 566 (Ala. 1992) (one year was a reasonable restriction); Sheffield v. Stoudenmire, 553 So. 2d 125 (Ala. 1989) (six months was an unreasonable restriction); Central Bancshares of the South v. Puckett, 584 So. 2d 829 (Ala. 1991) (two years was a reasonable restriction).

313. Malsberger, *supra* note 132, at 68 (citing Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 566 (Ala. 1992).

agreements.[314] The fear that noncompetition agreements will be declared null if they are too restrictive may cause employers to demand only that which is necessary to actually protect their interests.

2. Reformation

Like Louisiana, Alabama allows its courts to reform noncompetition agreements that are overbroad. However, the courts have ruled that only provisions unreasonable as to time and territory may be reformed.[315]

3. Professionals

Alabama's statute specifically prohibits agreements restraining people from their professions,[316] and only those selling goodwill and those in an employment relationship are exempted in part (b) of the statute.[317] Professionals are not subject to the exemption in part (b) of the statute, and therefore noncompetition agreements are unenforceable against them.[318] Alabama's Supreme Court has determined that accountants, physicians, and veterinarians are professionals for purposes of the statute.[319] Alabama has adopted the Model Rules of Professional Conduct, and its Rule 5.6 restricts the application of noncompetition agreements to attorneys.[320]

4. Duress

The Alabama Supreme Court has held that the signing of a noncompetition agreement as a condition of continued employment does not constitute duress.[321] In addition, a federal district court has held that an at-will employment relationship does not mean no consideration existed for the contract.[322] However, courts may consider the fact that an employment relationship is at-will in determining the reasonableness of the agreement.[323]

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314. Agreements which have been upheld include a one year restriction on contacting insurance clients of the former employer and a prohibition of an ad salesman from working at another television station within a 60-mile radius for one year. *See* Clark, 592 So. 2d at 564 . Booth v. WPMI Television Co., 533 So. 2d 209 (Ala. 1988).

315. Malsberger, *supra* note 132 (citing Mason Corp. v. Kennedy, 244 So. 2d 585 (Ala. 1971)).

316. Ala.Code §8-1-1(a) (Michie 1975).

317. Ala.Code § 8-1-1(b) (Michie 1975).

318. Malsberger, *supra* note 132, at 60.

319. *Id.* (citing Cherry, Bekaert & Holland v. Brown, 582 So. 2d 502 (Ala. 1991) (accountant); Friddle v. Raymond, 575 So. 2d 1038 (Ala. 1991) (veterinarian); Odess v. Taylor, 211 So. 2d 805 (1968)(physician)).

320. Alabama Model Rules of Professional Conduct Rule 5.6. (1996).

321. Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 567 (Ala. 1992).

322. Malsberger, *supra* note 132, at 70, *citing* Affiliated Paper Cos. v. Hughes, 667 F. Supp. 1436 (N.D. Ala. 1987)).

323. Birmingham Television Corp. v. DeRamus, 502 So. 2d 761 (Ala. Civ. App. 1986).

B. Florida

1. Statutory Authorization and Interpretative Cases

Enacted in 1953, Florida Statutes §542.12 served as the model for Louisiana Revised Statutes 28:921.[324] The Florida Supreme Court stated in early decisions that the purpose of the statute was to protect the employer from unfair competition.[325] However, in the 1970s and 1980s the Florida courts adopted a contract-oriented approach to noncompetition agreements which led to conflicting and unprincipled decisions.[326] While recognizing that the policy of preventing unfair competition allowed courts to invalidate unreasonable noncompetition agreements, the contract-oriented approach did not leave the courts with such an option. Rather, it "provided no principled way for the courts to decline to enforce contractual restrictions upon competition that were not justified by the need to protect any substantial 'legitimate business interest' and...lent itself to distortion by result-oriented courts."[327]

As a result of the inconsistencies in application, §542.12 was amended in 1990, and was designated as §542.33.[328] However, this statute only introduced more

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324. The relevant text of the 1953 statute provided in 1979 that:

> (2) One who sells the good will of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer, and one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or any person deriving title to the good will from him, and so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction be enforced by injunction.

Fla. Stat. Ann. §542.12 (1979).

325. John A. Grant, Jr. and Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, 70 Fla. B.J. 53 (1996), (citing Miller Mechanical, Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974)).

326. *Id.*

327. *Id.*

328. *Id.* The statute as amended in 1990 provided the following:

> (1) Notwithstanding other provisions of this chapter to the contrary, each contract by which any person is restrained from exercising a lawful profession, trade, or business of any kind, as provided by subsections (2) and (3) hereof, is to that extent valid, and all other contracts in restraint of trade are void.
>
> (2)(a) One who sells the goodwill of a business, or any shareholder of a corporation selling or otherwise disposing of all of her or his shares in said corporation, may agree with the buyer, and one who is employed as an agent, independent contractor, or employee may agree with her or his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or any person deriving title to the goodwill from her or him, and so long as such employer, continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction. However, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no

ambiguities because it created the standardless defenses of "unreasonableness" and being "contrary to the public health, safety, or welfare," and further required irreparable injury for an agreement to be enforced, while specifying narrow instances when irreparable injury would occur.[329] Because the statute did not offer sufficient guidance to the courts, the Florida courts again split on its application and created even more uncertainty as to whether noncompetition agreements would be enforced.[330]

The legislature therefore amended the statute again in 1996.[331] The new statute is thorough and reverts to an unfair competition approach.[332] It includes illustrations and presumptions for the courts to apply.[333] It also requires that an employer prove a legitimate business interest in order to justify the restrictive covenant,[334] and the covenant must be reasonably necessary to protect that legitimate business interest.[335] The court may not consider the economic hardships of the employee,[336] but must consider any other legal or equitable defenses.[337] A court may reform an overbroad agreement so that it reasonably protects the legitimate business interests.[338]

Florida cases support the idea that the legislature's latest amendment of §542.335 is a "balanced statute that does not unnecessarily impede competition, the ability of competitors to hire experienced workers, or the efforts of employees to secure better

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showing of irreparable injury. However, use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined. In the event the seller of the goodwill of a business, or a shareholder selling or otherwise disposing of all her or his shares in a corporation breaches an agreement to refrain from carrying on or engaging in a similar business, irreparable injury shall be presumed.

(b) The licensee, or any person deriving title from the licensee, of the use of a trademark or service mark, and the business format or system identified by that trademark or service mark, may agree with the licensor to refrain from carrying on or engaging in a similar business and from soliciting old customers of such licensor within a reasonably limited time and area, so long as the licensor, or any person deriving title from the licensor, continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.

(3) Partners may, upon or in anticipation of a dissolution of the partnership, agree that all or some of them will not carry on a similar business within a reasonably limited time and area.

(4) This section does not apply to any litigation which may be pending, or to any cause of action which may have accrued, prior to May 27, 1953.

Fla. Stat. Ann. §542.33 (1997).

329. *Id.*

330. *Id.*

331. Fla. Stat. Ann. §542.335 (1997). Valid restraints of trade or commerce. For the full text of the statute, see Appendix A.

332. Gant & Steele, *supra* note 328, at 56.

333. *See, e.g.* Fla. Stat. Ann. §542.335(1)(b)(1-5), §542.335(1)(b)(4)(a-c), §542.335(1)(c) (1997).

334. Fla. Stat. Ann. §542.335(1)(b) (1997).

335. Fla. Stat. Ann. §542.335(1)(c) (1997).

336. Fla. Stat. Ann. §542.335(1)(g)(1) (1997).

337. Fla. Stat. Ann. §542.335(1)(g)(3) (1997). Must a court thus reconsider lack of consideration in at-will employment?

338. Fla. Stat. Ann. §542.335(1)(c) (1997).

paying positions."[339] For example, in *Anich Industries, Inc. v. Raney*,[340] the fifth district court of appeal refused to enjoin an employee, who had worked for her former employer for only three months, from working for a competitor after termination.[341] The court found that the employer had no legitimate business interest in enjoining the defendant from working for the competitor, as she received little training, learned no trade secrets, and did not develop substantial relationships with any clients.[342] In another case, the fourth district court of appeal refused to enforce a noncompetition agreement because the plaintiff had breached the employment contract, and therefore could not enforce the noncompetition agreement.[343] The third circuit court of appeal did uphold an agreement where the plaintiff had provided the defendant with more than 195 hours of training, resulting in him receiving FAA certification to repair heat exchangers.[344] Other cases enforced agreements after reforming them to what would be reasonably necessary to protect the employer's business interests.[345]

2. Reformation

Section 542.335 specifically permits a court to reform an overly broad provision such that it will allow the relief reasonably necessary to protect the employer's legitimate business interest.[346] This provision affirms prior Florida decisions that had authorized application of the "blue pencil doctrine."[347]

3. Professionals

Section 542.335 does not restrict its application to professionals. No decisions subsequent to the 1996 amendment have decided whether covenants not to compete may be enforced against professionals. However, in *Benemerito & Flores v.*

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339. Grant & Steele, *supra* note 328, at 55.

340. Anich Industries, Inc. v. Raney, 751 So. 2d 767 (Fla. 5th Dist. Ct. App. 2000).

341. *Id.*

342. *Id.* at 769-70. The court did not find any substantial relationship because the plaintiff's clients were not exclusive. Rather, they bought supplies from multiple sources based on price and availability. *Id.* at 770.

343. Benemerito & Flores v. Roche, 751 So. 2d 91 (Fla. 4th Dist. Ct. App. 1999). The court considered breach of contract as a legal defense.

344. Aero Kool Corp. v. Oosthuizen, 736 So. 2d 25 (Fla. 3d Dist. Ct. App. 1999).

345. Flickenger v. Fitzgerald & Co., Inc. 732 So. 2d 33 (Fla. 2d Dist. Ct. App. 1999) (reducing three year restriction to two years because three years was presumptively unreasonable and plaintiff presented no evidence to rebut that presumption); Austin v. Mid State Fire Equip., Inc., 727 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1999) (enforcing agreement with respect to nondisclosure of customer lists and prices, while striking the provision seeking to prohibit working for the competitor; working for the competitor would not cause harm if the employee does not approach customers or divulge pricing information).

346. Fla. Stat. Ann. §542.335(1)(c) (1997).

347. Grant & Steele, *supra* note 328, at 55 (citing Flammer v. Patton, 245 So. 2d 854 (Fla. 1971); Santana Products Co. v. Von Korff, 573 So. 2d 1027 (Fla. 2d. Dist. Ct. 1991)).

Roche,[348] the court of appeal may have enforced the covenant had the plaintiff/employer not breached its employment contract with the defendant/employee.[349]

4. Duress/At-Will Employment

Continued employment is deemed sufficient consideration for entering into a restrictive covenant, both before the statutory amendment and after.[350]

IX. POSSIBLE SOLUTIONS

Although no solution is likely to resolve all problems surrounding noncompetition clauses, some suggestions are presented in this section that could, if implemented, ameliorate the problems with Louisiana Revised Statutes 23:921.

A. Judicial Activism

Until the Louisiana legislature amends Revised Statutes 23:921, the Louisiana Supreme Court could resolve some problems by looking to the purpose of the statute and require agreements to be reasonable, much like the Alabama Supreme Court has done. Enabling lower courts to consider the reasonableness of noncompetition agreements would ensure that employers are not able to restrain the activities of its former employers beyond that which is necessary to protect his interests.

Although the second circuit has interpreted Louisiana Revised Statutes 23:921 narrowly and therefore enforces noncompetition agreements against fewer types of employees,[351] this approach does not ensure adequate protection for employers. A situation could arise when an employee who has not opened his own competing business and is not soliciting customers misappropriates something that his former employer provided him. For example, if an employer financed the employee's general training and the employee quit before the employer could recoup his investment, the former employer would have no remedy unless the employee opened a competing business or solicited former customers. More suitable judicial activism would be to apply a reasonableness test to every noncompetition agreement, thereby ensuring enforcement or invalidation where appropriate.

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348. Benemerito & Flores v. Roche, 751 So. 2d 91 (Fla. 4th Dist. Ct. App. 1999).

349. The court did not mention any policies against enforcing restrictive covenants against professionals.

350. Balasco v. Gulf Auto Holding, Inc., 707 So. 2d 858, 860 (Fla. Dist. Ct. App. 1998); Coastal Unilube, Inc. v. Smith, 598 So. 2d 200 (Fla. Dist. Ct. App. 1992).

351. The second circuit only enforces noncompetition agreements against employees who open their own competing businesses or against employees who solicit customers of their former employers. *See* Summit Inst. for Pulmonary Med. and Rehabilitation, Inc. v. Prouty, 691 So. 2d 1384 (La. App. 2d Cir.), *writ denied*, 701 So. 2d 983 (1997); *see also* discussion in *supra* Part VI.A.

B. Rewrite the Statute

Considering that Louisiana's noncompetition statute was based, in part, on the Florida statute which failed and has been amended twice, Louisiana should strongly consider revamping its own statute. Moreover, the fact that Alabama courts have applied a reasonableness test to the statute undermines the "mechanical adherence" approach taken by Louisiana courts. Not only have Louisiana courts been unable to deal with the issues surrounding noncompetition agreements consistently, but the statute allows employers to prohibit more than any other typical jurisdiction.[352]

Florida's latest enactment regarding noncompetition agreements appears to encompass all important issues. It manages to protect an employer's investment in an employee while restricting the employee only to the degree necessary to protect that investment. Therefore, it restrains trade as little as is necessary to prevent others from gaining unfair advantages. Although it might be argued that such a statute does not provide any certainty at the time of the signing of the agreement and will therefore increase litigation, if an agreement is reasonable and minimally restrictive, the employee will be more likely to comply and thereby avoid litigation. Moreover, if the agreement appears to be too intrusive considering the qualities of the employment relationship, the employer will not seek to enforce it, again avoiding the costs of litigation.

C. Rarely Use Noncompetition Agreements in Louisiana

As argued by Paul H. Rubin and Peter Shedd in their article, *Human Capital and Covenants Not to Compete*, noncompetition agreements are unnecessary, except when an employer provides training that cannot be financed by employers, such as trade secrets.[353] However, even trade secrets can be protected by the Louisiana Uniform Trade Secret Act. Even if an *employer* pays for general training, he may ensure that he recoups his investment by providing a liquidated damages clause in the employee's employment contract.

D. Protect the Employer's Interests Using Other Areas of Law

The Louisiana Uniform Trade Secret Act (UTSA)[354] may be used to protect information like customer lists in some circumstances. A customer list may be considered a trade secret if efforts are made to maintain its secrecy.[355] If a customer list is valuable, the owner/employer will undoubtedly take steps to maintain its secrecy. Furthermore, a former employee has a fiduciary duty not to use or communicate information given to him in confidence to compete with his former

352. *Cf.* La. R.S. 23:921 (Supp 2001).

353. Rubin & Shedd, *supra* note 289.

354. La. R.S. 51:1431-39 (1987).

355. Pontchartrain Medical Labs, Inc. v. Roche Biomedical Labs.., 677 So. 2d 1086, 1090 (La. App. 1st Cir. 1996), (citing Wyatt v. PO2, Inc., 651 So. 2d 359 (La. App. 2d Cir.), *writ denied*, 654 So. 2d 331 (1995)).

employer unless the information given is a matter of general knowledge.[356] If an employee misappropriates the confidential information by using or disclosing the trade secret without the consent of his former employer,[357] he will be liable to his former employer for the actual loss caused by the misappropriation and the amount by which he has been unjustly enriched.[358] It should be noted that the use of information retained by *memory* does not constitute a violation of the act;[359] thus, UTSA will not protect all of an employer's confidential information. If an employee will have the occasion to memorize sensitive information that an employer wishes to protect, a noncompetition agreement would then be appropriate.

E. Use Liquidated Damages Provisions in Every Employment Contract

There is no reason why employers cannot include liquidated damages provisions contracts in their employment contracts.[360] Training financed by the *employer* has a determined value, and an employer knows the length of time needed to recoup his investment. An employer could set forth a term of employment that coincides with the time necessary to recoup the training investment, and if the employee should quit prior to the expiration of the term, he would be required to pay an amount in liquidated damages.

Liquidated damages provisions would simplify the termination of employment for both employers and employees. Employees would have a monetary incentive to remain employed by the employer who provided and financed training. Moreover, if an employee wished to work elsewhere, he would be able to tell his new employer how much it was going to cost to leave his current job; the new employer could then decide whether the employee is worth that amount. If an employee chooses to quit, the employer would recover the amount of money expended on that employee for training, either from the employee himself, or more likely from the new employer. Litigation might be drastically decreased, and the only issue perhaps warranting the court's review is the reasonableness of the liquidated damages provision.[361]

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356. NCH Corp. v. Broyles, 749 F.2d 247, 254 (5th Cir. 1985). This duty results from the principal-agent relationship between the employer and the employee. *Id.*

357. La. R.S. 51:1431(2)(b) (1997).

358. La. R.S. 51:1433 (1997).

359. *See NCH Corp.*, 749 F.2d at 254.

360. Liquidated damages provisions are specifically authorized by Louisiana Civil Code Article 2005, which states in part: "Parties may stipulate the damages to be recovered in case of nonperformance defective performance, or delay in performance of an obligation."

361. Liquidated damages provisions should reasonably approximate the expected loss and should not be penal. American Leasing Co. of Monroe, Inc. v. Lannon E. Miller & Son, General Contracting, Inc., 469 So. 2d 325 (La. App. 2d Cir. 1985). However, because actual damages are not a prerequisite to recovery, a court must determine whether the provision is reasonable by inquiring whether the parties truly attempted to reasonably approximate actual damages. La. Civ. Code art. 2009; American Leasing, 469 So. 2d 328-29.

X. CONCLUSION

Noncompetition agreements should not be used in as many circumstances as they currently are. In fact, there is rarely a need for them to ever apply. However, while Louisiana courts continue to enforce noncompetition agreements in favor of employers without respect to the reasonableness of such provisions, employers will undoubtedly continue to require their employees to sign them. Employers simply have to include severability clauses and structure the agreements correctly, and the agreement will be enforced.

Conversely, employees have little power. Rarely do employees seek the advice of legal counsel prior to signing a noncompetition agreement, and rarely do they consider that one will actually be enforced against them if it is unfair. In addition, employees usually lack the bargaining power at the time they enter into noncompetition agreements to negotiate something different. Furthermore, Louisiana courts have no mechanism to invalidate unfair agreements if they comply with the statute.

Louisiana courts and the Louisiana legislature should strongly consider adopting an approach that will truly protect the interests of employers while balancing the rights of employees to seek employment elsewhere.

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Appendix A

Florida Statute §542.335. Valid restraints of trade or commerce

(1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought.

(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).

2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships with specific prospective or existing customers, patients, or clients.

4. Customer, patient, or client goodwill associated with:

a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";

b. A specific geographic location; or

c. A specific marketing or trade area.

5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

(d) In determining the reasonableness in time of a postterm restrictive covenant not predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions:1. In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration.

2. In the case of a restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 1 year or less in duration and shall presume unreasonable in time any restraint more than 3 years in duration.

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,a

court shall presume reasonable in time any restraint 3 years or less in duration and shall presume unreasonable in time any restraint more than 7 years in duration.

(e) In determining the reasonableness in time of a postterm restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of 5 years or less and shall presume unreasonable in time any restraint of more than 10 years. All such presumptions shall be rebuttable presumptions.

(f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

(g) In determining the enforceability of a restrictive covenant, a court:

1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.

2. May consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction.

3. Shall consider all other pertinent legal and equitable defenses.

4. Shall consider the effect of enforcement upon the public health, safety, and

welfare.

(h) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

(i) No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(k) In the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant. A court shall not enforce any contractual provision limiting the court's authority under this section.

(2) Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the laws of the United States or of this state.

(3) This act shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before July 1, 1996.